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An Unanswered Question About Mandatory Arbitration: Should a Mandatory Arbitration Clause Preclude the EEOC From Seeking Monetary Relief on an Employee's Behalf in a Title VII Case?

Joyce E. Taber

American University Washington College of Law

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An Unanswered Question About Mandatory Arbitration: Should a
Mandatory Arbitration Clause Preclude the EEOC From Seeking
Monetary Relief on an Employee's Behalf in a Title VII Case?

AN UNANSWERED QUESTION ABOUT
MANDATORY ARBITRATION:
SHOULD A MANDATORY ARBITRATION
CLAUSE PRECLUDE THE EEOC FROM
SEEKING MONETARY RELIEF ON AN
EMPLOYEE'S BEHALF IN A TITLE VII CASE?

JOYCE E. TABER*

TABLE OF CONTENTS

Introduction.....	282
I. Background	285
A. <i>Gilmer</i> and Mandatory Arbitration Under the FAA.....	285
B. Title VII Statutory Scheme and Remedies	288
II. Circuit Split on Scope of EEOC Remedies and Monetary Relief.....	292
A. Only Injunctive Relief	292
1. Second Circuit: <i>EEOC v. Kidder, Peabody & Co.</i>	292
2. Fourth Circuit: <i>EEOC v. Waffle House, Inc.</i>	297
B. Both Monetary and Injunctive Relief	300
1. Sixth Circuit: <i>EEOC v. Frank's Nursery & Crafts, Inc.</i> ...	300
2. Sixth Circuit: <i>EEOC v. Northwest Airlines</i>	307
III. Analysis and Recommendations	310
A. Consensus Regarding Injunctive Relief.....	310
B. Only Injunctive Relief	311
C. Both Monetary and Injunctive Relief	316
Conclusion	322

* Editor-in-Chief, *American University Law Review*, Volume 50; J.D. Candidate, May 2001, *American University, Washington College of Law*, B.A., 1992, *College of William and Mary, magna cum laude*. Special thanks to Professor Susan Carle, *American University, Washington College of Law*, for her encouragement and assistance in editing multiple drafts. I am also grateful to Brian Esser, Note and Comment Editor, *American University Law Review*, Volume 49, for his guidance throughout the editing process. I would also like to thank my parents, Robert and Mary Ann Taber, for their love, support, and inspiration.

INTRODUCTION

In *Gilmer v. Interstate/Johnson Lane Corp.*,¹ the Supreme Court determined that statutory employment discrimination claims are arbitrable under the Federal Arbitration Act (“FAA”)² based on a mandatory arbitration clause³ in an employment contract.⁴ Consequently, the circuit courts have extended the *Gilmer* rationale beyond the Age Discrimination in Employment Act of 1967 (“ADEA”)⁵ to include Title VII of the Civil Rights Act of 1964 (“Title VII”).⁶ The *Gilmer* Court, however, left some questions unanswered.⁷

1. 500 U.S. 20 (1991).

2. 9 U.S.C. §§ 1-16 (1994). Originally enacted in 1925, *see* Act of Feb. 12, 1925, ch. 213, §§ 1-15, 43 Stat. 883, the FAA was codified as Title 9 of the United States Code in 1947. 9 U.S.C. §§ 1-16; *see also Gilmer*, 500 U.S. at 24 (reviewing the history of the FAA). Section 2 of the FAA states that the purpose of the FAA is to enforce private contractual agreements to arbitrate: “A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

3. An arbitration clause is inserted in a contract to require mandatory arbitration of any disputes arising under the contract terms. Arbitration refers to “[a] process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard.” BLACK’S LAW DICTIONARY 105 (6th ed. 1990). *See generally* FRANK ELKOURI & EDNA ELKOURI, HOW ARBITRATION WORKS (5th ed. 1997) (providing an overview of arbitration methods); James B. Dye & Lesly L. Britton, *Arbitration by the American Arbitration Association*, 70 N.D. L. REV. 281 (1994) (same). The arbitrator’s decision is binding on the parties to the contract. *See, e.g., DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 821 (2d Cir. 1997) (explaining that “[a]rbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation’ . . .”) (quoting *Willemijn Houdstermaatschappij BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997)). Reviewing courts will only modify or vacate an arbitration award in rare instances where the arbitrator showed “manifest disregard for the law.” *DiRussa*, 121 F.3d at 821 (citations omitted).

4. *See Gilmer*, 500 U.S. at 23 (articulating the issue of whether a federal age discrimination claim could be subject to mandatory arbitration under an arbitration agreement). The Court held that an ADEA claim can be subject to compulsory arbitration. *Id.* at 35. The Supreme Court recently held that mandatory arbitration clauses are valid even where imposed as a condition of employment because the FAA exempts only employment contracts of transportation workers. *See Circuit City Stores, Inc. v. Adams*, No. 99-1379, 2001 WL 273205, at *1 (Mar. 21, 2001).

5. 29 U.S.C. §§ 621-634 (1994 & Supp. IV 1998) (providing federal statutory provisions against age discrimination).

6. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at scattered sections of U.S.C.) (prohibiting unlawful employment discrimination based on race, color, religion, sex, or national origin); 42 U.S.C. § 2000e-2(a)(1) (1994) (stating the purpose of Title VII); *id.* § 2000e-5 (articulating the Equal Employment Opportunity Commission (“EEOC”) enforcement powers under Title VII); *see also Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997) (extending *Gilmer* to hold that Title VII claims are subject to mandatory arbitration); *Hurst v. Prudential Sec., Inc.*, 21 F.3d 1113 (9th Cir. 1994) (unpublished table decision) (same); *Bender v. A.G. Edwards & Sons*, 971 F.2d 698, 700 (11th Cir. 1992) (same); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 934 (9th Cir. 1992) (same); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 308 (6th Cir. 1991) (same); *Alford v. Dean Witter*

In particular, the Court did not resolve the scope of remedies available to the Equal Employment Opportunity Commission (“EEOC”) when it files an independent suit on behalf of an employee who signed an arbitration agreement, but did not pursue a claim in an arbitral forum.⁸

Recently, a circuit split has emerged on this issue.⁹ On the one hand, the Sixth Circuit, in *EEOC v. Frank’s Nursery & Crafts, Inc.*,¹⁰ held that the EEOC can seek both monetary damages and equitable relief when it sues on behalf of an employee who signed a mandatory arbitration agreement.¹¹ The Sixth Circuit recently reaffirmed this holding in *EEOC v. Northwest Airlines, Inc.*¹² On the other hand, the Second and Fourth Circuits, have declined to follow the Sixth Circuit’s approach.¹³ In *EEOC v. Kidder, Peabody & Co., Inc.*¹⁴ the Second Circuit held that, under *Gilmer*, the EEOC can only seek injunctive relief, not monetary relief, when it files an independent suit based on the charges of an employee who signed an arbitration agreement.¹⁵ The Fourth Circuit recently adopted the Second

Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991) (same).

7. See Donald R. Livingston, *The Civil Rights Act of 1991 and EEOC Enforcement*, 23 STETSON L. REV. 53, 93-96 (1993) (discussing issues left unresolved by *Gilmer*, including the uncertain effect of the decision on EEOC enforcement powers).

8. See Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1374 n.99 (1997) (indicating that *Gilmer* left as an open question whether a mandatory arbitration agreement precludes the EEOC from seeking monetary relief on behalf of individual employees).

9. In 1998 and 1999, four cases in three circuit Courts of Appeal addressed the scope of EEOC remedies in an independent suit on behalf of an employee who signed a mandatory arbitration agreement. See *infra* text accompanying notes 10-17 (summarizing the circuits’ positions on the issue). Even though Part III of this Comment will discuss the substantive holdings of each case in detail, a brief chronology of this recently emerging case law is as follows: (1) August 28, 1998: Second Circuit decision in *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998); (2) April 23, 1999: Sixth Circuit split with Second Circuit in *EEOC v. Frank’s Nursery & Crafts, Inc.*, 177 F.3d 448 (6th Cir. 1999); (3) September 13, 1999: Sixth Circuit followed *Frank’s Nursery* in *EEOC v. Northwest Airlines, Inc.*, 188 F.3d 695 (6th Cir. 1999); (4) October 6, 1999: Fourth Circuit followed the Second Circuit approach in *EEOC v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999), *cert. granted*, No. 99-1823, 2001 WL 285799 (Mar. 26, 2001).

10. 177 F.3d 448 (6th Cir. 1999).

11. See *id.* at 468 (reversing the district court’s dismissal of the EEOC’s suit and reinstating the action to allow EEOC to pursue monetary damages and injunctive relief).

12. 188 F.3d 695, 701-03 (6th Cir. 1999) (applying *Frank’s Nursery* in holding that an arbitration agreement did not interfere with EEOC’s Title VII action).

13. See *infra* Part II.A (describing the views of the Second and Fourth Circuits regarding the scope of EEOC remedies and monetary relief).

14. 156 F.3d 298 (2d Cir. 1998).

15. See *id.* at 303 (stating that allowing an individual who has consented to an arbitration agreement “to make an end run around the arbitration agreement by having the EEOC pursue back pay or liquidated damages on his or her behalf would undermine the *Gilmer* decision and the FAA”).

Circuit's view in *EEOC v. Waffle House, Inc.*¹⁶

This Comment argues that the courts should adopt the Sixth Circuit's approach.¹⁷ First, this approach best adheres to congressional intent as expressed in the statutory language and legislative history of the 1972 Amendments to Title VII,¹⁸ the Civil Rights Act of 1991,¹⁹ and the FAA.²⁰ Second, this approach supports the purpose of damage remedies to compensate victims and to deter employers from engaging in unlawful employment discrimination.²¹ Third, this approach allows the EEOC to invoke the full range of statutory remedies, including punitive damages, for egregious or repeated acts of intentional discrimination.²² Fourth, the Sixth Circuit's approach safeguards against arbitration agreements that do not permit the employee to obtain the full range of statutory remedies.²³ Finally, this approach permits the courts to maintain discretion over equitable relief, such as back pay or injunctions.²⁴

Contrary to the Second and Fourth Circuits' reasoning, the *Gilmer* decision did not limit the power of the EEOC to seek legal remedies, such as compensatory damages or punitive damages, or equitable remedies such as back pay or injunctive relief when the agency files an independent suit.²⁵ The Sixth Circuit's view demonstrates that the resolution of individual claims through private arbitration is consistent with the enforcement of Title VII through an independent

16. 193 F.3d 805, 812 (4th Cir. 1999), *cert. granted*, No. 99-1823, 2001 WL 285799 (Mar. 26, 2001) (agreeing with the Second Circuit approach and holding that the arbitration agreement precluded the EEOC from pursuing remedies of back pay, reinstatement, and compensatory and punitive damages).

17. *See infra* Part III.C.

18. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e-5 (1994)) (providing statutory framework to promote equal employment opportunities to American workers).

19. *See* Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 1981a (1998)) (amending Title VII and the Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12101 (1994), to allow a complaining party to seek compensatory and punitive damages).

20. *See* 9 U.S.C. §§ 1-16 (1994); *see also infra* Part IV.C (arguing that the Sixth Circuit approach is consistent with Title VII, the Civil Rights Act of 1991 and the FAA).

21. *See infra* notes 204-25 and accompanying text (explaining how the Sixth Circuit approach fulfills purposes of remedies).

22. *See infra* text accompanying notes 235-48 (discussing how full statutory remedies are necessary for the EEOC to respond to egregious or repeated acts of discrimination).

23. *See infra* text accompanying notes 246-53 (explaining that arbitration agreements may not provide for full statutory remedies).

24. *See infra* text accompanying notes 254-59 (arguing that the courts should retain discretion to fashion equitable relief).

25. *See infra* notes 37-42, 201 and accompanying text (explaining that *Gilmer* did not resolve the issue of the proper scope of EEOC remedies).

EEOC suit that seeks the full range of legal and equitable remedies.²⁶ In a recent pronouncement, Congress added compensatory and punitive damages to Title VII remedies in the Civil Rights Act of 1991.²⁷ In another provision of the Act, Congress also encouraged the use of alternative dispute resolution²⁸ to resolve employment discrimination claims.²⁹ Employers easily could frustrate congressional intent if they are able to avoid the new damage remedies added by the 1991 Act simply by putting a mandatory arbitration clause in employees' contracts.³⁰

Part II of this Comment provides an overview of the *Gilmer* decision, the Title VII statutory scheme, and the purposes of Title VII remedies. Part III discusses the circuit split on the proper scope of the EEOC remedies when it files an independent suit on behalf of an employee who has signed an arbitration agreement. Part IV argues that the courts should adopt the Sixth Circuit approach, allowing the EEOC to seek both monetary and injunctive relief. Part V concludes that the Sixth Circuit approach is fully consistent with Title VII, the Civil Rights Act of 1991, the *Gilmer* decision, and the FAA.

I. BACKGROUND

A. GILMER AND MANDATORY ARBITRATION UNDER THE FAA

The circuit split over the scope of EEOC remedies arises primarily from a difference in interpretation of the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*³¹ Prior to *Gilmer*, it was

26. See *infra* notes 133-41, 225-27 and accompanying text (explaining the Sixth Circuit view that the EEOC has the authority to seek full statutory remedies).

27. See Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-74 (codified at 42 U.S.C. § 1981a (1994)) (adding monetary damages to Title VII remedies); see also *infra* notes 54-56, 210-17 and accompanying text (discussing the new compensatory and punitive damages remedies added to Title VII by the Civil Rights Act of 1991).

28. Alternative dispute resolution, or "ADR," refers to a range of techniques used to resolve disputes without litigation, including arbitration, mediation, mini-trials, and other methods, typically reducing cost and providing faster resolution than court litigation. See, e.g., STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION 4-5 (2d ed. 1991) (discussing movement in the U.S. for alternative forms of dispute resolution, including initiatives by the American Bar Association); Frank E.A. Sander, Varieties of Dispute Resolution, 70 F.R.D. 111 (1976) (discussing the various methods of ADR); Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 247 (1996) (discussing several ADR techniques).

29. See Civil Rights Act of 1991 § 118 (encouraging the use of alternative means of dispute resolutions); see also *infra* note 218 and accompanying text (discussing the provision of the 1991 Act encouraging alternative dispute resolution).

30. See *infra* notes 219-22 and accompanying text (explaining how the 1991 Act provision encouraging arbitration is consistent with the EEOC's ability to seek full statutory remedies).

31. 500 U.S. 20 (1991); see also *supra* note 9 (introducing the circuit split in

unclear whether statutory claims under anti-discrimination statutes were subject to mandatory pre-dispute arbitration agreements in the non-union context.³² *Gilmer* and its progeny resolved this issue by holding that statutory anti-discrimination claims, including Title VII, were subject to arbitration under the FAA.³³

interpreting *Gilmer*). The facts of the *Gilmer* case involved a securities representative who had to sign a registration application as a condition of employment in the securities industry. *See id.* at 23. The application required arbitration under New York Stock Exchange (NYSE) rules for “[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative.” *Id.* (alteration in original) (quoting NYSE Rule 347). *Gilmer* contended that his claim for unlawful termination under the ADEA, 29 U.S.C. §§ 621-634 (1994 & Supp. IV 1998), was not subject to mandatory arbitration. *See Gilmer*, 500 U.S. at 26-27.

32. The pre-*Gilmer* line of cases indicated that statutory discrimination claims were not subject to mandatory arbitration in the collective-bargaining or union context. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (holding that a non-discrimination arbitration clause in a collective bargaining agreement did not take away the statutory right of individual employees to file suit in federal court on Title VII claims). Although the *Gardner-Denver* Court based its decision in part on the special conditions present in the collective bargaining context, the Court also stated that mandatory arbitration was more appropriate to contractual claims than statutory claims. *See id.* at 56 (“Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII.”). After *Gardner-Denver*, however, the Court expanded the scope of mandatory arbitration clauses to include statutory claims. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (holding that arbitration of statutory claims is enforceable under the FAA “unless Congress itself has evinced an intention to preclude waiver of judicial remedies for the statutory rights at issue”). The *Mitsubishi* Court held that federal antitrust claims under the Sherman Act, 15 U.S.C. §§ 1-7 (1994), were arbitrable under the FAA. *See id.* at 640.

33. *See Gilmer*, 500 U.S. at 35 (finding a lack of congressional intent to preclude arbitration under these circumstances and thus holding that ADEA claims can be subject to mandatory arbitration); *see also supra* note 6 (collecting cases that extended *Gilmer* rationale allowing mandatory arbitration of anti-discrimination claims to Title VII cases). *But see Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1202-03 (9th Cir.), *cert. denied*, 525 U.S. 982 (1998) (holding that Title VII claims cannot be subject to compulsory arbitration under a mandatory arbitration clause); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, POLICY STATEMENT ON MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT (1997), *available at* <http://www.eeoc.gov/docs/mandarb.html> (last visited Feb. 16, 2001) (explaining the EEOC’s view that mandatory arbitration agreements are invalid for Title VII claims). Although *Gilmer* and its progeny establish the legitimacy of mandatory arbitration under individual employment contracts, the Supreme Court thus far has declined to extend the *Gilmer* rationale to the collective bargaining context and in the process overturn *Gardner-Denver*. *See Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 81 (1998) (declining to resolve the issue of whether a clear and unmistakable waiver of statutory anti-discrimination rights in a collective bargaining agreement could be subject to mandatory arbitration). *But see Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 876, 880-82 (4th Cir.), *cert. denied*, 519 U.S. 980 (1996) (relying on *Gilmer* to hold that federal statutory rights are subject to compulsory arbitration under the mandatory arbitration clause of a collective bargaining agreement). *See generally* Susan T. Mackenzie & Pearl Zuchlewski, *Arbitration and Employment Disputes, in ARBITRATION NOW: OPPORTUNITIES FOR FAIRNESS, PROCESS RENEWAL AND INVIGORATION* 31, 43 (Paul H. Haagen ed., 1999) (noting the uncertainty regarding mandatory

In reaching its holding, the *Gilmer* Court reasoned that the purpose of the FAA, enacted in 1925, was to reverse a trend of judicial hostility toward arbitration.³⁴ Most importantly, the *Gilmer* Court recognized that when an employee agrees to arbitrate, the agreement does not amount to a waiver of the substantive rights under the statute; rather, the arbitration agreement is only a waiver of a judicial forum in favor of an arbitral forum.³⁵ The Court further stated that “so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”³⁶

As Part III of this Comment will demonstrate, the circuit split over EEOC remedies focuses on language in the *Gilmer* decision. When plaintiff *Gilmer* argued that enforcing his arbitration clause would undermine the EEOC’s enforcement powers, the Court responded that he could still file a charge with the EEOC.³⁷ Similarly, when *Gilmer* contended that the clause was not enforceable because it did not allow equitable relief, the Court stated, “it should be remembered that arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief.”³⁸

Although the Second and Fourth Circuits rely on this language to justify limiting the EEOC to obtain injunctive relief only,³⁹ the *Gilmer* court did not determine the scope of EEOC remedies.⁴⁰ Rather,

arbitration clauses in the collective bargaining context).

34. See *Gilmer*, 500 U.S. at 35 (stating that the FAA reflects a legislative intent to promote arbitration agreements). Because the purpose of the FAA was to encourage the courts to look favorably on agreements to arbitrate, the *Gilmer* Court articulated a test to determine whether an agreement should be enforced by the courts: “[H]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver or judicial remedies for the statutory rights at issue.” *Id.* at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

35. See *id.* at 26 (“[B]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.”) (quoting *Mitsubishi*, 473 U.S. at 628).

36. *Id.* at 28 (alteration in original) (quoting *Mitsubishi*, 473 U.S. at 637).

37. See *id.* at 28 (indicating that the EEOC’s enforcement powers would not be undermined in *Gilmer*’s case because “[a]n individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action”).

38. *Id.* at 32.

39. See *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 811 (4th Cir. 1999), *cert. granted*, No. 99-1823, 2001 WL 285799 (Mar. 26, 2001) (acknowledging the Supreme Court’s position in *Gilmer* that the EEOC acts in a public role and is not bound by private agreements to arbitrate); *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 302 (2d Cir. 1998) (relying on *Gilmer* in concluding that “arbitration agreements will not preclude the EEOC from seeking class-wide equitable relief”) (quoting *Gilmer*, 500 U.S. at 32).

40. See *infra* note 201 (collecting sources asserting that the Second Circuit took *Gilmer*’s language out of context, and that the *Gilmer* Court did not resolve the issue

these statements properly are understood as a response to Gilmer's objections to the enforcement of his particular arbitration clause, not as statements of broad application for all EEOC suits.⁴¹ The *Gilmer* decision is silent with respect to the remedies available to the EEOC when filing an independent suit.⁴²

B. Title VII Statutory Scheme and Remedies

As Part III.B of this Comment will discuss, the Sixth Circuit relied heavily on Title VII's statutory scheme when the court held that the EEOC could seek both monetary and injunctive relief in an independent suit on behalf of an employee who signed a mandatory arbitration agreement.⁴³ Title VII does not provide merely for private suits to enforce the law; rather, the statute provides for dual enforcement through both private suits by individuals and independent suits by the EEOC.⁴⁴ As originally established, the EEOC could use only conciliatory efforts to combat employment discrimination.⁴⁵ In 1972, however, Congress amended Title VII to

of EEOC remedies).

41. See *infra* note 202 (describing the debate over whether *Gilmer* stands for the proposition that the EEOC is limited to injunctive relief).

42. In addressing other unanswered questions in the post-*Gilmer* era, the focus of judicial scrutiny has shifted to whether the arbitral forum provides sufficient procedural safeguards for employees. Some courts have indicated that arbitration must include the full range of remedies available under the statute in order to provide the effective "vindication" of rights envisioned by *Gilmer*. See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) (finding that an arbitration agreement should "provide[] for all of the types of relief that would otherwise be available in court" in order to meet *Gilmer's* intention that the plaintiff would be able to effectively vindicate statutory rights in an arbitral forum); *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1246-48 (9th Cir. 1994) (finding that an arbitration clause that waived federal statutory remedies was unenforceable); *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459, 466 (S.D.N.Y. 1997) (refusing to enforce the portion of an arbitration agreement which did not allow the remedy of attorneys fees that would have been available in court); Richard A. Bales, *Creating and Challenging Compulsory Arbitration Agreements*, 13 LAB. LAW. 511, 541-44 (1998) (interpreting the *Gilmer* statement that arbitration does not constitute a waiver of substantive rights to mean that limitations on remedies available in arbitration are increasingly subject to attack); Michael Delikat & René Kathawala, *Arbitration of Employment Discrimination Claims Under Pre-Dispute Agreements: Will Gilmer Survive?*, 16 HOFSTRA LAB. & EMPLOYMENT L.J. 83, 92-93 (1998) (arguing that courts in the post-*Gilmer* era are likely to invalidate an arbitration agreement if it does not provide full statutory remedies).

43. See also *infra* notes 133-37 and accompanying text (explaining the Sixth Circuit's analysis of the Title VII statutory scheme).

44. See 42 U.S.C. § 2000e-5(a) to (k) (1994) (articulating the EEOC's enforcement powers under Title VII to prevent employment discrimination); § 2000e-5(f)(1) (1994) (authorizing suits by both the EEOC and private individuals to enforce Title VII).

45. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(e), 78 Stat. 241, 258-59 (codified as amended at 42 U.S.C. § 2000e-5(a) (1994)) ("The Commission shall have power . . . to assist in such effectuation by conciliation or such other remedial

expand the authority of the EEOC, granting it the power to file its own independent civil action.⁴⁶

Under the original Title VII statute, the complaining party could seek specified types of relief.⁴⁷ The statute provided the following equitable remedies:⁴⁸ injunction from engaging in unlawful employment practices,⁴⁹ an order of affirmative action such as

action as is provided by this title . . .”). Under the original act, if the EEOC failed to succeed in conciliation, the agency’s role ended, allowing only the charging party to file a claim in federal court. *See id.* § 706(e) (providing that if the Commission is unable to obtain compliance with the title, a civil action may be brought by the aggrieved person); *EEOC v. Frank’s Nursery & Crafts, Inc.*, 177 F.3d 448, 456-57 (6th Cir. 1999) (explaining the EEOC’s limited role under the original Title VII statute).

46. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4a, 86 Stat. 103 (codified at 42 U.S.C. § 2000e-5(f) (1994)) (providing that if the EEOC is unable to secure voluntary compliance from the employer, EEOC may bring a civil action). Congress strengthened the EEOC’s enforcement powers because “failure to grant the EEOC meaningful enforcement powers ha[d] proven to be a major flaw in the operation of Title VII.” *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 325 (1980) (quoting S. REP. NO. 92-415, at 4 (1971)). Congress decided that it was crucial that “effective enforcement procedures be provided the Equal Employment Opportunity Commission to strengthen its efforts to reduce discrimination in employment.” H. REP. NO. 92-238, at 3 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2139, *quoted in Frank’s Nursery*, 177 F.3d at 457.

Under the amended statutory scheme, first, the aggrieved employee must file a charge with the EEOC within 180 days of the alleged discriminatory occurrence. *See* 42 U.S.C. § 2000e-5(e) (laying out the procedural framework of filing a charge with the EEOC). The EEOC then issues notice to the party charged and conducts an investigation. *See id.* § 2000e-5(b) (describing in detail actions that EEOC must undertake when an aggrieved employee files a charge). The purpose of the investigation is to determine whether there is reasonable cause to believe that the charge of discrimination is true. *Cf. id.* (stating the EEOC is to dismiss the charge if “there is no[] reasonable cause to believe that the charge is true,” and empowering the Commission to attempt to eliminate the unlawful practice if the charge appears true). When the EEOC finds reasonable cause, the agency tries to resolve the matter through “conference, conciliation, and persuasion.” *Id.* If the EEOC cannot resolve the charge through conciliation, it may initiate a civil action in federal court. *See id.* § 2000e-5(f)(1). Aggrieved persons have a right to intervene in the EEOC’s civil action. *See id.* If the EEOC does not file a civil action within 180 days of the initial charge, the EEOC may issue a “right to sue” letter to the aggrieved party, who may then file a private suit in federal court within 90 days. *See* 29 C.F.R. § 1601.28 (1999) (delineating EEOC regulations on issuing right to sue letter); *see also* 42 U.S.C. § 2000e-5(f)(1) (requiring the Commission to notify the aggrieved person that the Commission has not brought an action). The EEOC also may intervene in an individual suit. *See id.* (stating that the court has discretion to allow the Commission to intervene if “the case is of general public importance”).

47. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(g), 78 Stat. 241, 261 (codified at 42 U.S.C. § 2000e-5(g) (1994)) (listing possible remedies if the court finds the employer engaged in unlawful employment practices intentionally).

48. Equitable relief, issued by the court under the equitable principle of fairness, usually includes injunction or specific performance and is distinct from money damages. *See generally* DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.1(2) (1973) (indicating that equitable remedies are intended to coerce action, to provide restitution, or to issue a declaratory order).

49. The injunction is an equitable remedy ordering or prohibiting a specific act. *See generally* DOBBS, *supra* note 48, § 2.9(1) (defining injunction as an in personam order directing the defendant to act or to refrain from acting in a specified way that

reinstatement or hiring, back pay,⁵⁰ or other equitable relief as determined by the court.⁵¹ In addition, Congress passed the Civil Rights Act of 1991,⁵² adding money damages to Title VII remedies to further deter employment discrimination.⁵³ In cases of intentional discrimination, Congress enhanced the scope of remedies to include compensatory⁵⁴ and punitive damages.⁵⁵ The 1991 Act specifies caps

is enforceable by the contempt power); *id.* § 7.4 (explaining that the injunctive remedy is used extensively in civil rights cases to provide specific relief to individuals and groups).

50. Although a type of monetary relief, back pay is an equitable remedy, defined as the “total compensation the employee has lost from the date of the adverse employment decision through the date of final judgment.” HAROLD S. LEWIS, JR., CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW § 5.10 (1997). Because of its equitable character, the court determines whether a back pay award should be granted. *See id.* But *see infra* note 57 (explaining that under the Civil Rights Act of 1991, the plaintiff can request a jury trial when the complaint seeks compensatory or punitive damages). The purpose of back pay is to “make whole” the victim of unlawful employment discrimination. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (recognizing that denial of back pay frustrates the central purposes of Title VII—the “make whole” purpose and “eradicating discrimination throughout the economy”).

51. 42 U.S.C. § 2000e-5g (1994) (providing guidelines for the court for fashioning remedies). *See generally* LEWIS, *supra* note 50, § 5.10 (providing an overview of various equitable remedies for Title VII violations); TECHNICAL ASSISTANCE PROGRAM, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THEORIES OF DISCRIMINATION A-2 to A-3 (1995) (describing possible Title VII remedies).

52. Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-74 (codified at 42 U.S.C. § 1981a (1994)) (amending the Civil Rights Act of 1964).

53. *See* 42 U.S.C. § 1981 note (1994) (Congressional Findings) (providing for damages in intentional discrimination cases in response to findings that additional remedies are necessary to prevent harassment and intentional discrimination). The expansion of remedies available under Title VII was based on the congressional finding that “additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace.” *Id.*; *see also infra* notes 204-20, 235-48 and accompanying text (discussing in detail how the Sixth Circuit approach gives effect to the purposes of the money damage remedies recently added to the Title VII statute).

54. *See* 42 U.S.C. § 1981a(b)(2) (allowing recovery of compensatory damages and excluding back pay and interest on back pay from compensatory damages); *id.* § 1981a(b)(3) (imposing limitations on the amount of compensatory damages the plaintiff can recover). Compensatory damages are available in cases of intentional discrimination under Title VII for pecuniary losses (including past and future out-of-pocket expenses) and non-pecuniary losses suffered because of discrimination. *See* TECHNICAL ASSISTANCE PROGRAM, *supra* note 51, at A-2 (defining compensatory damages). Compensatory damages for pecuniary losses include expenses for medical care, moving, job searches, or physical therapy. *See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: COMPENSATORY AND PUNITIVE DAMAGES AVAILABLE UNDER SECTION 102 OF THE CIVIL RIGHTS ACT OF 1991 8 (1992) [hereinafter EEOC DAMAGES GUIDANCE]. Compensatory damages for non-pecuniary losses compensate the victim for intangible injuries, such as emotional pain, loss of enjoyment of life, and injury to reputation or professional standing. *See id.* at 10.

55. *See* 42 U.S.C. § 1981a(b)(1) (allowing recovery of punitive damages in certain cases brought under Title VII). Punitive damages are available in cases of intentional discrimination under Title VII where the employer acted with “malice or with reckless indifference” to the employee’s federally protected rights. EEOC DAMAGES GUIDANCE, *supra* note 54, at 15; *see also* H.R. REP. NO. 102-40(I), at 72 (1991), *reprinted*

on combined compensatory and punitive damages⁵⁶ awarded by a jury.⁵⁷

The three circuit courts that have addressed the proper scope of EEOC remedies in an independent suit on behalf of an employee who signed a mandatory arbitration agreement have considered the purposes of federal anti-discrimination statutes, the language of *Gilmer*, and the purpose of the FAA to enforce contractual agreements to arbitrate.⁵⁸ As Part III of this Comment will discuss, the Second and Fourth Circuits favor the FAA in their analyses of statutory anti-discrimination claims, contending that an arbitration agreement limits EEOC remedies to injunctive relief.⁵⁹ The Sixth Circuit argues, however, that the EEOC's right to seek a full range of remedies is not inconsistent with the FAA.⁶⁰ In fact, the Sixth Circuit's solution provides the best implementation of the 1972 amendments to Title VII, the Civil Rights Act of 1991, and the

in 1991 U.S.C.C.A.N. 549, 610 (stating that to receive punitive damages under Title VII, a plaintiff "must first prove intentional discrimination, then must *prove actual injury or loss* arising therefrom to recover compensatory damages, and must meet an even higher standard (establishing that the employer acted with malice or reckless or callous indifference to their rights) to recover punitive damages"). See generally LEWIS, *supra* note 50, § 5.11 (describing application of the malice or reckless indifference standard for punitive damages).

56. See 42 U.S.C. § 1981a(b)(3) (imposing limitations on the sum of compensatory and punitive money damages based on the number of employees in the workplace); see also EEOC DAMAGES GUIDANCE, *supra* note 54, at 14, 18 (explaining that punitive and compensatory damages under Title VII are determined by a jury, but cannot exceed the caps on damages delineated in section 1981a(b)(3), preventing excessive damage awards).

57. See 42 U.S.C. § 1981a(c) (allowing any party to demand a jury trial when seeking money damages under the 1991 Act). The purpose of the jury award of punitive damages is to punish and deter unlawful employment discrimination. See *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (stating that "the damages a plaintiff recovers contribute[] significantly to the deterrence of civil rights violations in the future"); see also *Luciano v. Olsten Corp.*, 110 F.3d 210, 221 (2d Cir. 1997) (stating that punitive damages are determined by the jury based on the amount necessary to punish the defendant for its conduct and to deter the defendant and other employers from engaging in such activity).

58. See *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 812 (4th Cir. 1999), *cert. granted*, No. 99-1823, 2001 WL 285799 (Mar. 26, 2001) (balancing the policies implicated by *Gilmer*, the federal discrimination statutes and the federal policy favoring arbitration); *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 470-71 (6th Cir. 1999) (Nelson, J., dissenting) (noting the clash of philosophical interests between the visions of public good contained in Title VII (promoting collective public interests) and the FAA (promoting individual right to contract)); *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 303 (2d Cir. 1998) (indicating the need to strike a balance between the competing public interests of eliminating employment discrimination and encouraging enforcement of arbitration agreements under the FAA).

59. See *infra* Part II.A (discussing the Second and Fourth Circuit cases holding that the EEOC can seek only injunctive relief).

60. See *infra* note 201 and accompanying text (explaining that the Sixth Circuit approach does not undermine *Gilmer* or the FAA).

purposes of Title VII remedies.⁶¹

II. CIRCUIT SPLIT ON SCOPE OF EEOC REMEDIES AND MONETARY RELIEF

Four recent cases have focused on whether the EEOC may seek monetary relief in an independent suit where the aggrieved employee signed a mandatory arbitration agreement.⁶² Two options emerge regarding the proper scope of EEOC remedies. The EEOC should be able to seek: (1) only injunctive relief, or (2) both monetary and injunctive relief.⁶³

A. Only Injunctive Relief

1. Second Circuit: EEOC v. Kidder, Peabody & Co.

The Second Circuit first addressed this issue in *EEOC v. Kidder, Peabody & Co.*⁶⁴ when it held that the EEOC could seek only injunctive relief on behalf of employees who signed a mandatory arbitration clause.⁶⁵ In *Kidder, Peabody*, the EEOC brought suit for back pay, liquidated damages, and reinstatement on behalf of seventeen investment bankers under the Age Discrimination in Employment Act (ADEA).⁶⁶ The Second Circuit affirmed the district court's

61. See *infra* Part III.C (explaining why the Sixth Circuit approach provides the best solution to implement the purposes of Title VII).

62. See *EEOC v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999), *cert. granted*, No. 99-1823, 2001 WL 285799 (Mar. 26, 2001); *EEOC v. Northwest Airlines, Inc.*, 188 F.3d 695 (6th Cir. 1999); *EEOC v. Frank's Nursery and Crafts, Inc.*, 177 F.3d 448 (4th Cir. 1999); *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998); see also *supra* note 9 (outlining the chronology of these cases).

63. A third option, allowing the EEOC to seek neither monetary nor injunctive relief, was adopted by the district court in *Frank's Nursery, EEOC v. Frank's Nursery & Crafts, Inc.*, 966 F. Supp. 500, 505-06 (E.D. Mich. 1997), *rev'd*, 177 F.3d 448 (6th Cir. 1999). The Sixth Circuit, however, rejected this approach, holding that the district court erred in finding that the EEOC could not base its claim for injunctive relief on a charge filed by one individual. See *Frank's Nursery*, 177 F.3d at 468 (finding that EEOC can seek equitable relief for a class without citing numerous examples of discrimination); see also *infra* note 78 (explaining that the EEOC can seek injunctive relief by proving discrimination against one employee). Both the Second Circuit and the Fourth Circuit agree that the EEOC may seek injunctive relief based on charges filed by one employee who signed an arbitration agreement. See *infra* Part III.A (explaining the Second and Fourth Circuit's rationales for allowing the EEOC to seek injunctive relief).

64. 156 F.3d 298 (2d Cir. 1998), *aff'g* 979 F. Supp. 245 (S.D.N.Y. 1997).

65. See *id.* at 303 (holding public interests support allowing the EEOC to seek injunctive remedies, but that allowing monetary relief damages would undermine the FAA).

66. See *id.* See generally Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994 & Supp. III 1997) (prohibiting arbitrary age discrimination in employment practices). The bankers had signed a securities "U-4" registration form, which contained a mandatory arbitration clause agreeing to submit "any and all

dismissal, holding that a mandatory arbitration agreement precludes the EEOC from seeking purely monetary relief on behalf of an employee under the ADEA.⁶⁷

First, relying in part on *Gilmer*,⁶⁸ the *Kidder, Peabody* court analogized an arbitration agreement with an individual's prior litigation, settlement, or waiver of a claim, all of which prevent the EEOC from suing for monetary damages.⁶⁹ Applying the doctrine of *res judicata*,⁷⁰ courts have held that prior litigation, whether successful or not, precludes EEOC action for monetary relief on behalf of the individual in a subsequent suit.⁷¹ Similarly, relying on

claims arising out of their employment with Kidder" to binding arbitration. *Kidder, Peabody*, 156 F.3d at 300. During the litigation, Kidder, Peabody & Co. ceased its investment banking operations, and the EEOC dropped its request for injunctive relief. *See id.* The EEOC proceeded with the case for back pay and liquidated damages on behalf of nine of the seventeen bankers. *See id.* (noting that only these nine employees signed an arbitration form upon their employment with Kidder, Peabody). With only monetary relief remaining, the defendant moved to dismiss the case. *See id.* (arguing that previous arbitration agreements precluded the EEOC's suit for monetary damages and back pay).

67. *See Kidder, Peabody*, 156 F.3d at 303 (affirming the district court's dismissal of the case).

68. *See id.* at 301 (using settlement cases cited in *Gilmer*) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)). The *Gilmer* Court recognized that the EEOC did not have to be involved in the resolution of all employment discrimination claims, providing as examples three cases holding that prior settlement or waiver of a claim by an aggrieved employee would preclude the EEOC from seeking relief on behalf of that individual in a subsequent suit. *See Gilmer*, 500 U.S. at 28 (stating that nothing in the ADEA shows Congress meant for the EEOC to be involved in all employment suits); *see also Coventry v. United States Steel Corp.*, 856 F.2d 514, 518 (3d Cir. 1988) (finding that under contract principles, an employee may release all personal ADEA claims or claims on his or her behalf in a private settlement); *Moore v. McGraw Edison Co.*, 804 F.2d 1026, 1033 (8th Cir. 1986) (finding that an employee may validly waive a cause of action under the ADEA in a private, unsupervised release in exchange for severance pay); *Runyan v. Nat'l Cash Register Corp.*, 787 F.2d 1039, 1044-45 (6th Cir. 1986) (stating that an unsupervised release of an ADEA claim is valid).

69. *See Kidder, Peabody*, 156 F.3d at 301 (noting that courts have held that EEOC "may not seek monetary relief in the name of an employee who has waived, settled or previously litigated the claim"). *But see* Estreicher, *supra* note 8, at 1374 & nn.98-99 (disagreeing that *Gilmer* stands for the proposition that arbitration agreements preempt EEOC actions for monetary relief). Comparing *Kidder, Peabody* with the language in *Gilmer*, Estreicher suggests that although *Gilmer* did not preclude the EEOC from seeking equitable, class-wide relief, it did not resolve the issue of whether a mandatory arbitration agreement would preempt the EEOC from seeking monetary relief on behalf of employees who signed arbitration agreements. *See id.* at n.99.

70. Federal *res judicata*, or claim preclusion, includes three required elements: (1) a final judgment on the merits in earlier action, (2) an identity of same cause of action in previous and subsequent suit, and (3) an identity of same parties or privies in both suits. *See EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1289 (7th Cir. 1993) (outlining the three elements of *res judicata* in addressing the EEOC argument that it was not in privity with the plaintiff, and, thus, is not barred by the judgment against the plaintiff).

71. *See id.* at 1290-91 (holding that prior litigation, including dismissal of an employee's ADEA lawsuit as barred by the statute of limitations, had a *res judicata*

principles of mootness⁷² and res judicata,⁷³ courts have held that an employee's previous settlement has a preclusive effect on the EEOC's ability to seek monetary relief.⁷⁴ Finally, under waiver principles,⁷⁵ employees can waive not only their individual claims for monetary relief, but also the right of the EEOC to sue for monetary relief on their behalf.⁷⁶ On the other hand, an employee may not waive the right to file an EEOC charge.⁷⁷ In addition, the same courts have

effect on a subsequent EEOC lawsuit, precluding the EEOC from seeking individual relief such as back pay and liquidated damages); *EEOC v. United States Steel Corp.*, 921 F.2d 489, 496-97 (3d Cir. 1990) (finding that an employee's unsuccessful ADEA law suit before a jury precluded subsequent EEOC action for pension benefits for the employee).

72. An action is rendered moot if the issues are no longer live or if the parties fail to have a legally cognizable interest in the outcome. See *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1542-43 (9th Cir. 1987) (finding that even when the EEOC filed its suit first, a subsequent settlement by the employee of her Title VII claims rendered moot the EEOC's back pay claim on her behalf).

73. See *New Orleans Steamship Ass'n v. EEOC*, 680 F.2d 23, 25 (5th Cir. 1982) (reviewing the effect of Title VII settlement by consent decree on a subsequent EEOC action, and stating that "the EEOC may challenge a transaction which was the subject of prior judicial scrutiny in a private suit, if the subsequent challenge seeks different relief"); *Truvillion v. King's Daughter's Hosp.*, 614 F.2d 520, 525 (5th Cir. 1980) ("[T]he E.E.O.C. may not bring a second suit based on the transactions that were the subject of a prior suit by a private plaintiff, unless the E.E.O.C. seeks relief different from that sought by the individual."); *EEOC v. McLean Trucking Co.*, 525 F.2d 1007, 1011 (6th Cir. 1975) (holding that an employee's private settlement agreement in which he waived back pay claims under Title VII barred the employee from recovering any "private benefit" such as back pay in a subsequent independent EEOC suit). But see *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1361 (6th Cir. 1975) ("[T]he EEOC is not barred by the doctrine of res judicata from basing its complaint on charges of discrimination which it never agreed to settle.").

74. See, e.g., *EEOC v. Harvey L. Walner & Assocs.*, 91 F.3d 963, 969 (7th Cir. 1996) (explaining that settlement agreements often require the employee to waive their individual claims to relief).

75. See *Green v. United States*, 355 U.S. 184, 191 (1957) (stating that a waiver in the settlement context "connotes some kind of voluntary knowing relinquishment of a right").

76. See *supra* note 68 (discussing cases cited in *Gilmer*, which hold that the aggrieved employee's prior waiver or settlement of a claim precludes the EEOC from seeking monetary relief in an independent suit); see also *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1091 (5th Cir. 1987) ("[T]he employee can waive not only the right to recover in his or her own lawsuit but also the right to recover in a suit brought by the EEOC on the employee's behalf."). Under contract principles, the waiver must be knowing and voluntary. See *Coventry v. United States Steel Corp.*, 856 F.2d 514, 522 (3d Cir. 1988) (finding that waiver of ADEA and Title VII claims must be made knowingly and willfully); *Cosmair*, 821 F.2d at 1091 (finding that "[a] private, unsupervised waiver of an ADEA cause of action by an employee is valid as long as it is voluntary and knowing"); see also *Runyan v. Nat'l Cash Register Corp.*, 787 F.2d 1039, 1044 (6th Cir. 1986) (encouraging the application of contract principles in determining whether the plaintiff waived his ADEA claims knowingly and voluntarily).

77. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (stating that even though an employee who signed an arbitration agreement can be compelled to resolve claims in arbitration, the employee is still free to file a charge of employment discrimination with the EEOC); *Cosmair*, 821 F.2d at 1090 (finding that a waiver of the right to file a charge with the EEOC is void as against public policy);

held that prior litigation, settlement, or waiver does not preclude subsequent EEOC suits for injunctive relief to prevent further violations of an anti-discrimination statute.⁷⁸ As Part IV of this Comment will argue, however, *Gilmer* did not hold that the mere existence of a mandatory arbitration agreement should have the same preclusive effect as prior litigation, settlement or waiver.⁷⁹ The *Kidder, Peabody* court's analogy is inappropriate when an employee has not previously arbitrated a claim.⁸⁰

Second, the *Kidder, Peabody* court relied on the FAA and its liberal policy favoring the enforcement of arbitration agreements.⁸¹ The Second Circuit concluded that it would undermine the FAA if the EEOC could seek monetary relief on behalf of employees who had agreed to arbitrate their claims.⁸² In his concurring opinion,

EEOC v. Astra USA, Inc., 94 F.3d 738, 744 (1st Cir. 1996) (stating that an agreement not to assist in an EEOC investigation is void).

78. See EEOC v. Harris Chermín, Inc., 10 F.3d 1286, 1291 (7th Cir. 1993) (holding that the EEOC has an independent right to sue for injunctive relief under Title VII "to vindicate the public interest in preventing employment discrimination . . .") (quoting Gen. Tel. Co. v. EEOC, 446 U.S. 318, 326 (1980)); EEOC v. United Parcel Serv., 860 F.2d 372, 375-76 (10th Cir. 1988) (holding that an employee's private settlement of a Title VII claim after the EEOC filed suit does not moot the EEOC's right of action for injunctive relief on behalf of a class of individuals in the public interest); EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539, 1543 (9th Cir. 1987) (stating that an employee's private settlement of Title VII claim "does not moot the EEOC's right of action seeking injunctive relief to protect employees as a class and to deter the employer from discrimination"); New Orleans Steamship Ass'n v. EEOC, 680 F.2d 23, 25-26 (5th Cir. 1982) (holding that res judicata does not preclude EEOC suit for injunctive relief); EEOC v. McLean Trucking Co., 525 F.2d 1007, 1010 (6th Cir. 1975) (finding that res judicata does not bar EEOC from seeking injunctive relief). Furthermore, the EEOC can base its claim for injunctive relief on only one charge of discrimination. See *id.* (explaining that there was only one charge on which the EEOC could bring the case). Compare *General Tel.*, 446 U.S. at 323-24 (finding that the EEOC has an independent authority under Title VII to obtain injunctive relief on behalf of a class of employees by proving discrimination against just one employee and without being certified as a class representative under Rule 23 of the Federal Rules of Civil Procedure), with FED. R. CIV. P. 23(a) (requiring a numerous class, common questions of law or fact, typical claims or defenses, and adequacy of representation as prerequisites to certification as a class representative).

79. See *infra* text accompanying notes 251-53 and accompanying text (critiquing analogy that an arbitration agreement has the same preclusive effect as prior litigation, settlement, or waiver).

80. See *infra* text accompanying notes 251-53.

81. See EEOC v. Kidder, Peabody & Co., 156 F.3d 298, 302 (2d Cir. 1998) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Corp.*, 460 U.S. 1, 24 (1983)) (concluding that when an individual freely arbitrates an ADEA claim, the EEOC cannot pursue monetary remedies on that individual's behalf). In *Cone Memorial Hospital*, the Supreme Court said that, "[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . ." 460 U.S. at 24-25.

82. See *Kidder, Peabody*, 156 F.3d at 303 (concluding that "[t]o permit an individual, who has freely agreed to arbitrate all employment claims, to make an end run around the arbitration agreement by having the EEOC pursue back pay or

however, Judge Feinberg disagreed with this characterization, stating that monetary relief sought by the EEOC would not undermine the FAA unduly.⁸³ Judge Feinberg explained that EEOC resources are limited, and the agency would not “pursue monetary damages simply to accommodate employees seeking to avoid arbitration.”⁸⁴

Third, the Second Circuit held that the EEOC still could seek injunctive relief on behalf of employees who signed binding arbitration agreements.⁸⁵ Relying on language in *Gilmer*,⁸⁶ the court reasoned that an injunction is the proper remedy when the EEOC seeks to protect public rights.⁸⁷ Moreover, the court rejected the contention that injunctive relief alone would have less deterrent value to employers.⁸⁸ Again, Judge Feinberg disagreed with the majority’s assumption that the deterrent value of an arbitration award is equal to the deterrent value of monetary relief in an EEOC action.⁸⁹ Judge Feinberg stated, “On the contrary, I find it eminently plausible that the risk of a single, large award in an EEOC case brought on behalf of multiple employees would be a greater deterrent to illegal

liquidated damages on his or her behalf would undermine the *Gilmer* decision and the FAA”); *see also* EEOC v. Kidder, Peabody & Co., 979 F. Supp. 245, 247 (S.D.N.Y. 1997), *aff’d*, 156 F.3d 298 (2d Cir. 1998) (“It would frustrate the purposes of the FAA if the Court allowed the EEOC to recover monetary relief where parties have agreed to arbitrate their grievances.”).

83. *See Kidder, Peabody*, 156 F.3d at 304 (Feinberg, J., concurring) (disagreeing with the majority that allowing the EEOC to pursue monetary relief despite the presence of a valid arbitration agreement would be a way around the arbitration agreement); *see also infra* notes 225-34 and accompanying text (explaining the Sixth Circuit view that allowing the EEOC to seek monetary relief does not undermine the FAA).

84. *See Kidder, Peabody*, 156 F.3d at 304 (Feinberg, J., concurring) (emphasizing that because of these limited resources, most employees who submit to arbitration will not benefit from the EEOC involvement).

85. *See id.* at 303 (agreeing with the lower court that allowing the EEOC to pursue injunctive relief and promoting arbitration of the employee’s claim strikes the correct balance of interests).

86. *See Kidder, Peabody*, 156 F.3d at 301 (“[A]rbitration agreements will not preclude the EEOC from bringing actions seeking class-wide or equitable relief”) (quoting *Gilmer v. Interstate/Johnson Law Corp.*, 500 U.S. 20, 32 (1991)); *see also supra* notes 37-42 and accompanying text (describing the context of the language in the *Gilmer* decision relied on by the Second Circuit to limit the EEOC to injunctive relief). *But see infra* note 201 (rebutting the premise that the *Gilmer* stands for the proposition that the EEOC is limited to seeking injunctive relief on behalf of an employee who signed a mandatory arbitration clause).

87. *See Kidder, Peabody*, 156 F.3d at 302 (stating that “where an individual has freely contracted away, waived, or unsuccessfully litigated a claim, ‘the public interest in a back pay award is minimal’”) (quoting EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539, 1543 (1987)).

88. *See id.* at 303 (“We see no reason to believe that the threat of an award of monetary damages obtained by a private individual through arbitration has any less deterrent value than the threat of an award of monetary damage obtained by the EEOC.”).

89. *Id.* at 304 (Feinberg, J., concurring).

conduct than the risk of multiple smaller awards obtained by the employees through arbitration”⁹⁰

Therefore, the Second Circuit held that limiting the EEOC to injunctive relief strikes the proper balance between competing interests—the EEOC’s role in protecting the public interest against discrimination and the FAA’s role in encouraging enforcement of private arbitration agreements.⁹¹

2. *Fourth Circuit: EEOC v. Waffle House, Inc.*

A recent Fourth Circuit case, *EEOC v. Waffle House Inc.*,⁹² adopted the Second Circuit’s analysis in *Kidder, Peabody*.⁹³ Like *Kidder, Peabody*, *Waffle House* held that an employee’s waiver of a judicial forum for statutory claims in a mandatory arbitration clause precludes the EEOC from seeking monetary relief on the employee’s behalf, but does not bar injunctive relief.⁹⁴

In *Waffle House*, the EEOC brought suit under the Americans with Disabilities Act of 1990 (ADA)⁹⁵ and section 102 of the Civil Rights Act of 1991⁹⁶ against Waffle House restaurant for unlawful termination of Eric Baker, an epileptic employee who had a seizure at work.⁹⁷ The EEOC sought the following remedies: (1) a permanent injunction against Waffle House prohibiting disability discrimination,

90. *Id.*; see also *infra* notes 208-10 (explaining that arbitration awards are usually smaller than litigation judgments, reducing the deterrent effect). Judge Feinberg also expressed “grave doubt” that statutory rights are equally vindicated in arbitration. See *Kidder, Peabody*, 156 F.3d at 304 (Feinberg, J., concurring) (doubting the *Gilmer* assumption that rights can be well-vindicated in arbitration); see also *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 203-04 (2d Cir. 1998) (overturning an arbitration award because of the arbitrator’s manifest disregard for the law, and emphasizing the need for procedural safeguards necessary to ensure effective vindication of statutory rights in arbitration); *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 823 (2d Cir. 1997) (upholding an arbitration decision, but noting that the plaintiff’s rights under the ADEA may not be equally vindicated in arbitration because arbitrators in the securities industry do not have to award attorneys fees, a remedy provided for in the ADEA statute).

91. See *Kidder, Peabody*, 156 F.3d at 303 (delineating these competing public interests); see also *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993) (finding that when an employee has previously litigated an ADEA claim, the EEOC can adequately protect the public interest against employment discrimination through the injunction remedy).

92. 193 F.3d 805 (4th Cir. 1999), *cert. granted*, No. 99-1823, 2001 WL 285799 (Mar. 26, 2001).

93. 156 F.3d at 301-02 (allowing the EEOC to seek injunctive relief).

94. See *Waffle House*, 193 F.3d at 813 (explaining that although the EEOC may not have been able to pursue the individual’s remedies in court because of a prior arbitration agreement, it could still pursue injunctive relief).

95. 42 U.S.C. § 12117(a) (1994).

96. *Id.* § 1981a.

97. See *Waffle House*, 193 F.3d at 807 (noting that Eric Baker was discharged shortly after a seizure at work).

(2) a court order that Waffle House implement anti-discrimination programs, (3) back pay and reinstatement, (4) compensatory damages, and (5) punitive damages.⁹⁸ Baker had signed an employment application containing a mandatory arbitration clause.⁹⁹ Waffle House moved to compel arbitration against the EEOC under the FAA,¹⁰⁰ arguing that the EEOC should arbitrate Baker's claims.¹⁰¹ The district court denied the motion, finding the clause unenforceable.¹⁰²

On interlocutory appeal, the Fourth Circuit reversed, holding that the arbitration agreement was enforceable,¹⁰³ and proceeded to the issues of (1) whether the EEOC should be required to arbitrate on behalf of Baker and (2) the EEOC's remedies.¹⁰⁴ First, the court correctly held that Waffle House could not compel the EEOC to arbitrate Baker's claims.¹⁰⁵ Drawing on the statutory scheme of Title

98. *See id.* at 807-08 (noting that the EEOC sought these remedies in order to cure Waffle House's allegedly unlawful employment practices and to provide the employee with appropriate relief).

99. *See id.* at 807. The clause provided for arbitration of "any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment." *Id.*

100. *See* 9 U.S.C. § 4 ("A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . in a civil action . . . for an order directing that such arbitration proceed in the manner provided for in such an agreement.").

101. *See Waffle House*, 193 F.3d at 808 (describing Waffle House's motion to compel arbitration and, in the alternative, to dismiss the action).

102. *See id.* (district court opinion not reported) (noting the district court's reasoning that because Baker signed an application at a different Waffle House location from the one from where he was fired, the binding arbitration clause was unenforceable by the Waffle House where Baker was actually working).

103. *See Waffle House*, 193 F.3d at 809 (concluding that the employment application formed a binding arbitration agreement because the application was a "corporation-wide" document, the provisions of which would be enforceable wherever Baker was hired in the Waffle House corporation). Judge King dissented, arguing that under contract principles, no agreement to arbitrate existed between Baker and Waffle House. *See id.* at 813-16 (King, J., dissenting) (disagreeing that an employment agreement was made because Baker did not accept the job offered at the first restaurant).

104. *See id.* at 808 (introducing the issue of whether the EEOC could maintain an independent suit after ruling that Baker's arbitration agreement was enforceable).

105. *See id.* at 811-12 (stating that Congress established dual enforcement system of the ADA, and thus, EEOC cannot be compelled to arbitrate as it is not the "surrogate" for the aggrieved party). Referring to the Sixth Circuit's decision in *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (6th Cir. 1999), which held that the EEOC can seek both monetary damages and equitable relief on behalf of an employee who had signed a mandatory arbitration agreement, and the Second Circuit's decision in *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998), which held that the EEOC can only seek injunctive relief on behalf of an employee who had signed a mandatory arbitration agreement, the Fourth Circuit noted that "neither of the other two circuits that have addressed the question of the impact of a private arbitration agreement on the EEOC's ability to sue in its own name have concluded that such an agreement permits a court to force the EEOC into

VII under the 1972 Amendments, incorporated by reference into the ADA,¹⁰⁶ the court determined that the EEOC has an independent right to sue.¹⁰⁷ In addition, the court explained that, under contract principles, it could not compel the agency to arbitrate because the EEOC was not a party to the arbitration agreement.¹⁰⁸

Second, the court addressed the effect of Baker's arbitration agreement on the scope of EEOC remedies.¹⁰⁹ Relying on the FAA, the court stated that a precedent that permitted the EEOC to seek monetary damages would undermine the strong federal policy in favor of arbitration.¹¹⁰ The *Waffle House* Court expressly adopted the Second Circuit's balancing test when it weighed the federal interest in enforcing arbitration agreements against the EEOC's interest in suing employers who discriminate in the workplace.¹¹¹ The court reasoned that when the EEOC seeks monetary relief, including back pay, compensatory, and punitive damages, on behalf of a party in an arbitration agreement, "the EEOC's public interest is minimal."¹¹² In such cases, the balancing test favors the FAA, and the EEOC should be bound to the individual's agreement to arbitrate.¹¹³ In contrast, when the EEOC seeks broad injunctive relief, the balance weighs in

arbitration under the FAA." *Waffle House*, 193 F.3d at 811.

106. 42 U.S.C. § 12117(a) (1994) (incorporating by reference 42 U.S.C. § 2000e-4-9).

107. See *Waffle House*, 193 F.3d at 809 (reviewing the history of the ADA and the legislative history of the 1972 Amendments to Title VII); *id.* ("In enforcing the federal anti-discrimination laws, the EEOC does not act merely as a proxy for the charging party but rather seeks to 'advance the public interest in preventing and remedying employment discrimination' . . . The EEOC's independent authority . . . is clear.") (quoting *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 331 (1980)).

108. See *id.* at 809 (agreeing with the EEOC claim that it is not bound by the arbitration clause). The Supreme Court requires that courts interpret an arbitration agreement as a contract. See *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986) (stating that arbitration is a contractual matter, and thus, one cannot be forced to arbitrate a dispute if he was not a party to the contract).

109. See *Waffle House*, 193 F.3d at 812 (discussing the important role of the EEOC in effectively addressing workplace discrimination while recognizing the strong policy interests in enforcing arbitration agreements).

110. See *id.* ("To permit the EEOC to prosecute in court Baker's individual claim—the resolution of which he had earlier committed by contract to the arbitral forum—would significantly trample this strong federal policy favoring arbitration."); see also 9 U.S.C. § 2 (1994) (promoting enforcement of private agreements to arbitrate).

111. See *Waffle House*, 193 F.3d at 812 (recognizing the competing interests and approving of the balance struck by *Kidder, Peabody*); see also *supra* notes 68-90 (describing the Second Circuit's rationale in relying on the text of *Gilmer* and balancing competing interests between the FAA and the enforcement powers of the EEOC).

112. *Waffle House*, 193 F.3d at 812 (agreeing with the Second Circuit's reasoning).

113. See *id.* at 813 ("We . . . hold that when the EEOC enforces the individual rights of Baker by seeking back pay, reinstatement, and compensatory and punitive damages, it must recognize Baker's prior agreement to adjudicate those rights in the arbitral forum").

favor of the EEOC's capacity to protect the public interest.¹¹⁴ Therefore, the *Waffle House* Court concluded that if an employee signs an arbitration agreement, the EEOC may seek only injunctive relief.¹¹⁵

Both the Second and Fourth Circuits base their analyses on *Gilmer* and the FAA, reasoning that under the liberal federal policy favoring arbitration, an arbitration agreement, like a prior settlement or waiver, has a preclusive effect on the EEOC's ability to seek monetary relief.¹¹⁶

B. Both Monetary and Injunctive Relief

1. Sixth Circuit: EEOC v. Frank's Nursery & Crafts, Inc.

In *EEOC v. Frank's Nursery & Crafts, Inc.*,¹¹⁷ the Sixth Circuit declined to adopt the Second Circuit's balancing test and conclusion as set forth in *Kidder, Peabody*.¹¹⁸ The *Frank's Nursery* Court held that the EEOC could seek both monetary and injunctive relief.¹¹⁹

In *Frank's Nursery*, the EEOC brought suit on behalf of Carol Adams, an employee of Frank's Nursery & Crafts, who had filed a charge of race discrimination with the EEOC.¹²⁰ The EEOC filed suit under Title VII, alleging that Frank's Nursery failed to promote Adams based on her race.¹²¹ The EEOC sought: (1) a permanent injunction to prevent the employer from engaging in race

114. See *id.* at 812 (relying, as did the Second Circuit, on case law that precludes monetary relief but allows injunctive relief when the individual previously has litigated, settled, or waived claims); see also *supra* notes 70, 78 (noting cases discussing the preclusive effect of litigation, settlement, or waiver on EEOC monetary remedies, but permitting injunctive relief).

115. See *Waffle House*, 193 F.3d at 813 (remanding to the district court with orders to dismiss the EEOC's claims made on behalf of Baker without prejudice and to permit the EEOC to seek injunctive relief).

116. See *supra* note 39 (noting language in *Gilmer* that circuits have relied upon to support their conclusion that arbitration agreements preclude seeking monetary damages).

117. 177 F.3d 448 (6th Cir. 1999), *rev'g* 966 F. Supp. 500 (E.D. Mich. 1997).

118. See *id.* at 465 (indicating the court's disagreement with *Kidder, Peabody*). It should be noted that after the Sixth Circuit's decision, the parties in *Frank's Nursery* reached a private "settlement agreement, preclud[ing] Frank's Nursery from seeking [further] review of [the] decision." *EEOC v. Northwest Airlines, Inc.*, 188 F.3d 695, 703 (6th Cir. 1999) (Nelson, J., concurring).

119. See *Frank's Nursery*, 177 F.3d at 468 (reserving the district court's dismissal and permitting the EEOC to seek both forms of relief).

120. See *id.* at 452 (describing the circumstances upon which the EEOC filed this action).

121. See *id.* at 453 (describing that in its complaint, the EEOC alleged that Frank's Nursery had bypassed Adams's promotion and had unlawfully required Adams and other applicants to sign and comply with an application for employment that required arbitration of statutory rights afforded them by Title VII).

discrimination,¹²² (2) a permanent injunction to prevent the employer from using mandatory pre-dispute arbitration agreements,¹²³ (3) an order requiring the employer to implement anti-discrimination programs,¹²⁴ and (4) an order granting “make whole” relief for Adams, including back pay, compensatory damages, and punitive damages.¹²⁵

Frank’s Nursery countered the EEOC’s complaint and filed motions to compel Adams to arbitrate her dispute under the terms of her employment application¹²⁶ and the FAA,¹²⁷ and to dismiss the EEOC’s suit for monetary and injunctive relief.¹²⁸ The district court granted the motion to compel and dismissed the EEOC case in its entirety.¹²⁹ The Sixth Circuit reversed the district court and held that an employee’s mandatory arbitration clause does not bind the EEOC to the terms of the employee’s contract.¹³⁰ The Sixth Circuit reached

122. *See id.*

123. *See id.* On appeal, the EEOC did not pursue its claim that the arbitration clause was unenforceable, narrowing the issues solely to the scope of remedies available to the EEOC in an independent suit on behalf of an employee who signed a mandatory arbitration agreement. *See id.* at 454-55 & n.4 (noting the EEOC’s decision not to challenge the enforceability of such agreements even though the EEOC considers such agreements unenforceable as a matter of federal law). *Compare supra* note 9 (citing cases extending the *Gilmer* rationale, allowing mandatory arbitration of statutory claims, to Title VII cases), *with supra* note 33 (collecting cases and other sources challenging the legitimacy of the *Gilmer* decision and arguing that Title VII claims should not be subject to compulsory arbitration).

124. *See Frank’s Nursery*, 177 F.3d at 453 (noting the EEOC requested that Frank’s Nursery institute equal opportunity employment practices); *see also infra* note 49 (describing an affirmative order by the court as a type of injunction).

125. *See Frank’s Nursery*, 177 F.3d at 453 (noting that Adams did not intervene in the EEOC’s lawsuit for money damages); *see also infra* notes 50 (defining back pay remedy) and 54-55 (defining compensatory and punitive damages remedies).

126. *See Frank’s Nursery*, 177 F.3d at 452-53 (noting that Adams had signed the company’s application form which contained a clause agreeing to arbitrate all disputes arising out of her employment). The arbitration clause stated:

I understand and agree that any claim I may wish to file against the Company . . . relative to my employment or termination from employment (including but not limited to any claim for tort, discrimination, breach of contract, violation of public policy or statutory claim) must . . . be submitted for binding and final arbitration before the American Arbitration Association.

Id.

127. *See* 9 U.S.C. § 4 (1994) (authorizing a party to an arbitration agreement to seek a court order compelling arbitration under the contract terms).

128. *See Frank’s Nursery*, 177 F.3d at 453-54 (stating that Frank’s Nursery sought summary judgment in its favor as “the challenged employment application [was] enforceable as a matter of law”).

129. *See EEOC v. Frank’s Nursery & Crafts, Inc.*, 966 F. Supp. 500, 505 (E.D. Mich. 1997) (finding that “to the extent that Adams is bound by her agreement to arbitrate, so is the EEOC”); *see also supra* note 63 (explaining that the district court’s holding permitting the EEOC to seek neither monetary nor injunctive relief has been rejected by all of the circuits that have addressed the issue).

130. *See Frank’s Nursery*, 177 F.3d at 455 (noting the specific intent of Congress to empower the EEOC “to eradicate employment discrimination on behalf of the public

this conclusion by assessing the EEOC's authority under the Title VII statutory scheme and legislative history,¹³¹ and by rejecting contentions that the FAA, preclusion, or waiver principles prohibited the EEOC from seeking monetary relief.¹³²

First, the Sixth Circuit evaluated the Title VII statute. The court noted that the statute grants the EEOC 180 days of "exclusive jurisdiction" over a discrimination charge.¹³³ The *Frank's Nursery* court reasoned that the EEOC distinguishes between cases where the agency files its own suit to "vindicate the public interest" against employment discrimination and cases where the agency permits the employee to decide whether to file suit.¹³⁴ In the latter instance, the EEOC will issue a "right to sue" letter to the employee.¹³⁵ If the EEOC does decide to sue, the individual may not file suit as he or she has merely a right to intervene in the EEOC action.¹³⁶ Therefore, the Sixth Circuit concluded that the EEOC's right to sue is independent of the individual's right to pursue a claim in a judicial or arbitral forum.¹³⁷

interest").

131. See *infra* notes 133-41 and accompanying text (explaining the Sixth Circuit's analysis of Title VII); see also *supra* Part I.B (providing an overview of the Title VII statutory scheme).

132. See *infra* text accompanying notes 142-45 (describing the Sixth Circuit's rejection of preclusion and waiver principles).

133. See *Frank's Nursery*, 177 F.3d at 456 (citing *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980)) (stating that an aggrieved person may sue under the Title VII statutory scheme "at the expiration of the 180-day period of exclusive EEOC administrative jurisdiction if the agency has failed to move the case along to the party's satisfaction, has reached a determination not to sue, or has reached a conciliation or settlement agreement with the respondent that the party finds unsatisfactory"); see also *Occidental Life Ins. v. EEOC*, 432 U.S. 355, 361 (1977) ("[T]his private right of action does not arise until 180 days after a charge has been filed").

134. See *Frank's Nursery*, 177 F.3d at 456 (noting the different strategies available to the EEOC in bringing an employment discrimination suit); see also *General Tel.*, 446 U.S. at 326 ("[T]he EEOC is not merely a proxy for the victims of discrimination When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination."); *Occidental Life*, 432 U.S. at 368 ("[T]he EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties"); *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1359 (6th Cir. 1975) (stating that "the EEOC represents the public interest when it sues to enforce Title VII, not solely the interests of the private charging parties").

135. See *Frank's Nursery*, 177 F.3d at 456 (stating that the injured party may not bring a Title VII action without this "right to sue" letter); see also 29 C.F.R. § 1601.28(b) (explaining EEOC process for issuing "right to sue" letter to aggrieved individual).

136. See *Frank's Nursery*, 177 F.3d at 456 (noting that the injured party is barred from filing her own suit whenever "the EEOC choose[s] to sue on its own"); see also 42 U.S.C. § 2000e-5(f)(1) (1998) (stating that the aggrieved party has the right to intervene in an EEOC initiated action).

137. See *Frank's Nursery*, 177 F.3d at 458-59 ("[T]o empower a private individual to

The Sixth Circuit also based its conclusion on the legislative history of the 1972 Amendments to Title VII when the court explained that Congress granted the EEOC the right to sue to increase the agency's power to enforce Title VII.¹³⁸ Congress realized that the "failure to grant the EEOC meaningful enforcement powers [had] proven to be a major flaw in the operation of Title VII."¹³⁹ Furthermore, the *Frank's Nursery* court emphasized the congressional intent "that the EEOC, not private parties 'would have complete authority to decide which cases to bring to Federal District court.'"¹⁴⁰ Therefore, based on the language of Title VII and the legislative history, the Sixth Circuit concluded that an arbitration clause cannot divest the EEOC of its authority to sue when it determines that such suits are necessary to protect the public interest from employment discrimination.¹⁴¹

Under the second prong of its analysis, the *Frank's Nursery* court rejected the Second Circuit's contention that the FAA, preclusion, or waiver principles prohibited the EEOC from seeking monetary relief.¹⁴² First, the court correctly held that it could compel neither Adams nor the EEOC to arbitrate under section 4 of the FAA.¹⁴³ Under principles of contract interpretation, the court could not order Adams to arbitrate because she never filed an individual claim and failed to intervene in the EEOC's lawsuit.¹⁴⁴ Similarly, the court could not order the EEOC to arbitrate as the EEOC was not a party to

take away this congressional mandate, by entering into arbitration agreements . . . would grant that individual the ability to govern whether and when the EEOC may protect the public interest . . . and thereby undo the work of Congress in its 1972 amendments").

138. See *id.* at 456 (noting that Congress wanted to shift responsibility for "ensuring compliance with Title VII from private individuals to the EEOC"); see also Equal Employment Opportunity Act of 1972, § 4(a), 42 U.S.C. § 2000e-5(a) (1994) (stating that the EEOC "is empowered . . . to prevent any person from engaging in any unlawful employment practice").

139. *Frank's Nursery*, 177 F.3d at 457 (quoting S. REP. NO. 92-415, at 4 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2148).

140. *Id.* at 457-58 (quoting *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1361 & n.12 (6th Cir. 1975) (quoting 118 CONG. REC. 698 (Jan. 21, 1973) (statement of Senator Domenick))).

141. See *supra* note 137 (noting the consequences of an interdependent relationship between the EEOC and the aggrieved party on the right to sue).

142. See *Frank's Nursery*, 177 F.3d at 459-67 (providing detailed analysis of why neither the FAA, preclusion, nor waiver can be used to limit the EEOC's powers to receive monetary damages).

143. See *id.* at 459-60 (noting the court's holding); see also 9 U.S.C. § 4 (authorizing motions to compel arbitration).

144. See *Frank's Nursery*, 177 F.3d at 460 (stating that the court cannot compel Adams to arbitrate because "she [has] neither initiated an arbitration nor a federal lawsuit . . . and has thus not breached her agreement with Frank's"); see also *Volt Info. Scis., Inc. v. Bd. of Trustees*, 489 U.S. 468, 479 (1989) (indicating that contract law principles govern enforcement of arbitration agreements).

the arbitration agreement.¹⁴⁵

Second, the Sixth Circuit held that allowing the EEOC to seek monetary relief would not undermine the FAA or *Gilmer*.¹⁴⁶ The court reasoned that when an individual employee files a discrimination charge and the EEOC decides to sue, "that individual would no longer possess a private cause of action subject to her prior agreement to arbitrate. Rather, the EEOC would have a cause of action on behalf of that individual and the public interest that would fall outside the arbitration agreement."¹⁴⁷ Therefore, the court concluded that the FAA was inapplicable to EEOC enforcement actions under Title VII.¹⁴⁸

Regarding the principle of preclusion, the Sixth Circuit held that an employee's agreement to arbitrate does not have a res judicata effect on a subsequent EEOC suit for monetary relief.¹⁴⁹ The *Frank's Nursery* court distinguished the case law on which the Second Circuit relied, which held that prior litigation has a res judicata effect on the EEOC's ability to seek monetary relief on an employee's behalf.¹⁵⁰ The Sixth Circuit reasoned that unlike employees who have litigated fully their claims, Adams did not litigate her claim in a prior judicial proceeding, nor did she previously arbitrate her claim in an arbitral forum.¹⁵¹ Furthermore, the Court emphasized that Adams was not in privity with the EEOC, and therefore, the res judicata principle did not apply.¹⁵²

145. See *Frank's Nursery*, 177 F.3d at 460 (noting that "the EEOC . . . never agreed to arbitrate with Frank's"); see also *supra* note 108 and accompanying text (discussing the Fourth Circuit view that the courts cannot compel the EEOC to arbitrate when it was not a party to a private arbitration agreement).

146. See *Frank's Nursery*, 177 F.3d at 461 (noting the court's reluctance to interpret *Gilmer* as a limitation on the EEOC's right to seek whatever relief it so chooses).

147. *Id.* at 462.

148. See *id.* (noting the court's holding, which relied on provisions in Title VII creating public and private rights of action and the legislative history of the 1972 amendments).

149. See *id.* at 463 (deciding that preclusion is not applicable because the EEOC's interests are not identical to the aggrieved party's).

150. See *id.* at 462-63 (referring to *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286 (7th Cir. 1993) and *EEOC v. United States Steel Corp.*, 921 F.2d 489 (3d Cir. 1990)). These decisions held that a case may be precluded by the existence of a contract or prior proceeding. See *id.*

151. See *id.* at 464 ("[W]e observe that Adams neither filed suit against Frank's nor pursued an arbitral remedy against Frank's that led to a substantive resolution of her claim of discrimination.").

152. See *id.* at 462 (explaining that a nonparty may be bound as a privy by a previous proceeding where the "relationship between the nonparty and the party is such as to legally entitle the latter to stand in judgment for the former or where the nonparty's interests were adequately represented by a party with the same interests") (citing *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940)); cf. *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 331 (1980) ("[T]he EEOC is authorized to proceed in a unified action and to obtain the most satisfactory overall relief even though competing interests are

For similar reasons, the *Frank's Nursery* court rejected the election of remedies doctrine¹⁵³ to preclude EEOC action for monetary relief.¹⁵⁴ The court explained that Adams merely exchanged a judicial forum for an arbitral one when she signed the arbitration contract; she did not actively pursue a remedy.¹⁵⁵ The Sixth Circuit concluded that, unlike an individual who actually pursued resolution of statutory rights through prior litigation or in arbitration, "Adams therefore stands in the same shoes as an individual who possesses the 'right to sue' but never files a complaint."¹⁵⁶

In addition, the Sixth Circuit disagreed with the Second Circuit's assertion in *Kidder, Peabody* that an agreement to arbitrate has the same preclusive effect on monetary relief as settlement, waiver, or an arbitral award.¹⁵⁷ To distinguish *EEOC v. Goodyear Aerospace Corp.*¹⁵⁸ from Adams's case, the Sixth Circuit reasoned that Adams had not "received satisfaction of her interests" when she waived her right to a judicial forum in an arbitration agreement.¹⁵⁹ Therefore, in *Frank's Nursery*, the principles of settlement, waiver, or a prior arbitral award

involved The individual victim is given his right to intervene for this very reason.").

153. See *Frank's Nursery*, 177 F.3d at 464 (explaining that the doctrine of election of remedies applies when "an individual having two coexistent but inconsistent remedies chooses to exercise one, in which event he loses the right to thereafter exercise the other") (citations omitted).

154. See *id.* (noting the doctrine's "inapplicability to actions brought under Title VII").

155. See *id.* ("By signing her arbitration agreement, Adams merely traded a judicial forum for an arbitral one—she did not 'pursue' an arbitral remedy just by signing an agreement to arbitrate in the event that she suffered a violation of her statutory rights."); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (recognizing that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

156. *Frank's Nursery*, 177 F.3d at 464.

157. See *id.* at 465 ("[W]e must part company with the Second Circuit to the extent it would bar the EEOC from suing for both monetary and injunctive relief on behalf of such an employee."); see also *supra* notes 68-76 (explaining the Second Circuit's application of settlement and waiver principles to the mandatory arbitration context).

158. 813 F.2d 1539, 1543 (9th Cir. 1987) (holding that even when the EEOC filed suit first, a later private settlement by the employee waiving her right to back pay mooted the EEOC's back pay claim on the employee's behalf).

159. See *Frank's Nursery*, 177 F.3d at 465-66 (distinguishing *Goodyear* in that Adams did not reach settlement nor did she voluntarily relinquish her back pay claim); see also Brief of the Equal Employment Opportunity Commission as Appellant at 20, *Frank's Nursery* (No. 97-1698) [hereinafter *EEOC Frank's Nursery Brief*] ("None of those rationales makes any sense in this case, however, where there has been no other prior resolution of the charging party's discrimination claim and no relief has yet been granted."); *supra* note 155 (explaining that under *Gilmer*, an arbitration agreement is a waiver of the judicial forum, not a substantive resolution of rights under the federal statute).

do not undermine the EEOC's independent authority to decide whether to file a Title VII suit.¹⁶⁰

Furthermore, the *Frank's Nursery* court raised concerns that the rule of law adopted by the Second Circuit would reduce incentives to employers to eliminate and prevent unlawful employment discrimination.¹⁶¹ Most importantly, the Sixth Circuit recognized that the Second Circuit's approach in a Title VII case would undermine Congress's recent expansion of monetary remedies available to the EEOC under the Civil Rights Act of 1991.¹⁶²

Finally, the *Frank's Nursery* court held that an arbitration agreement does not preclude the EEOC from seeking injunctive relief.¹⁶³ The court relied on *General Telephone Co. v. EEOC*¹⁶⁴ to conclude that the EEOC may seek class-wide relief based on proof of discrimination against just one employee.¹⁶⁵ Therefore, the Sixth Circuit concluded that an employee's agreement to arbitrate does not preclude the EEOC from seeking both money damages and injunctive relief in a Title VII suit.¹⁶⁶

160. See *Frank's Nursery*, 177 F.3d at 465-66 (disputing the Second Circuit view that allowing the EEOC to seek monetary relief allows the employee to "make an end run around the arbitration agreement") (quoting *EEOC v. Kidder, Peabody & Co., Inc.*, 156 F.3d 298, 303 (2d Cir. 1998)). In contrast, the Sixth Circuit explained:

while Title VII affords recovery through private action or an action by the EEOC, it does not allow both, and the power to decide which route to follow rests in the hands of the EEOC, not the aggrieved employee. Since the statute does not grant an individual the power to obtain recovery without authorization from the EEOC, such an individual cannot, by making decisions about her own ability to sue for herself, override the power of the EEOC to sue in its own name.

Id. at 466.

161. See *id.* (emphasizing the deterrent effect of monetary relief such as back pay or compensatory and punitive damages on employers); see also *supra* notes 50, 54-55 and accompanying text (discussing the purposes of back pay, compensatory, and punitive damages).

162. See *Frank's Nursery*, 177 F.3d at 466 (determining that not allowing monetary relief like punitive damages would undermine Congress's intent to strengthen EEOC enforcement powers as expressed in the Civil Rights Act of 1991); see also 42 U.S.C. § 1981a(a)(1) (1994) (allowing the complaining party, with certain specific exceptions, to seek compensatory and punitive damages under Title VII); *infra* notes 210-17 and accompanying text (analyzing the Sixth Circuit's approach allowing compensatory and punitive damages under the Civil Rights Act of 1991).

163. See *Frank's Nursery*, 177 F.3d at 467 (noting that the EEOC may be entitled to injunctive relief if it can show intentional discrimination).

164. 446 U.S. 318, 330 (1980).

165. See *Frank's Nursery*, 177 F.3d at 467 (noting *General Telephone's* holding that the EEOC may receive injunctive relief on behalf of individual claimants); see also *supra* note 78 and accompanying text (showing that the EEOC can seek injunctive relief based on charges of discrimination against one employee).

166. See *Frank's Nursery*, 177 F.3d at 468 (permitting the EEOC to seek monetary and injunctive relief). In a separate opinion, Judge Nelson concurred in part, agreeing that the EEOC could seek class-wide injunctive relief. See *id.* at 468 (Nelson, J., concurring in part and dissenting in part) (agreeing with the majority as to

2. Sixth Circuit: EEOC v. Northwest Airlines

The Sixth Circuit followed its holding in *Frank's Nursery* in a recent case, *EEOC v. Northwest Airlines, Inc.*¹⁶⁷ *Northwest Airlines* agreed that an employee's arbitration agreement does not divest the EEOC of its independent authority to seek monetary and injunctive relief under Title VII.¹⁶⁸

The EEOC filed suit against Northwest Airlines in the U.S. District Court for the Eastern District of Michigan, alleging intentional race-based discrimination against Gloria Hamilton and class-wide claims of a racially hostile work environment affecting Hamilton and other African-American employees in violation of Title VII.¹⁶⁹ The EEOC also alleged violations of a prior consent decree entered by the U.S. District Court for the District of Minnesota prohibiting Northwest Airlines from engaging in racial harassment of its employees.¹⁷⁰ The factual allegations of the EEOC complaint detailed numerous instances of flagrant racial harassment, including disparaging racial statements by managers, Ku Klux Klan symbols and racial graffiti depicting lynchings in the work area, and a noose hanging in the employee lunch room.¹⁷¹ The EEOC also alleged that managers failed to remedy the racial harassment despite repeated complaints from African-American workers.¹⁷² The EEOC sought (1) an injunction, (2) compensatory damages, and (3) punitive damages on

general injunctive relief for the EEOC). Judge Nelson dissented in part, however, from the majority view that the EEOC could seek money damages on behalf of an employee who signed an arbitration agreement. *See id.* at 468-69 (Nelson, J., concurring in part and dissenting in part) (stating he would have followed the Second Circuit decision with respect to the money damages sought on behalf of an employee by the EEOC, and would have found the agreement to arbitrate such claims enforceable). Judge Nelson argued that the Sixth Circuit should adopt the rationale in *Kidder, Peabody* balancing the individual's right to contract under the FAA against the EEOC's interest in preventing employment discrimination under Title VII. *See id.* at 469-71 (Nelson, J., concurring in part and dissenting in part). Agreeing with the Second Circuit, Judge Nelson concluded that allowing the EEOC to seek only injunctive relief on behalf of individuals who signed arbitration agreements "strikes the right balance between these interests." *Id.* at 471 (Nelson, J., concurring in part and dissenting in part) (quoting *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 303 (2d Cir. 1998)).

167. 188 F.3d 695 (6th Cir. 1999).

168. *See id.* at 702 (reversing the arbitration order that did not allow the EEOC to seek relief). Concurring in the judgment, Judge Nelson noted his dissent in *Frank's Nursery* and restated his position that the Sixth Circuit erred in allowing the EEOC to seek monetary relief. *See id.* (Nelson, J., concurring) (noting his disagreement with the majority in the previous *Frank's Nursery* decision).

169. *See id.* at 698.

170. *See id.* (noting that the EEOC also claimed Northwest did not comply with the consent decree from *Aburime v. Northwest Airlines, Inc.*, a previous class action lawsuit).

171. *See id.* at 697-98.

172. *See id.* at 698 (describing managers' decisions not to take action against the alleged offenders under their supervision).

behalf of Hamilton and other employees.¹⁷³

The Michigan court transferred the case to the District of Minnesota based on the Minnesota court's jurisdiction over the consent decree claim.¹⁷⁴ The Minnesota court dismissed the consent decree claim and Hamilton's individual claim because she had signed an arbitration agreement with Northwest, but declined to dismiss the class-wide claims.¹⁷⁵ The Minnesota court then transferred the case back to the Eastern District of Michigan, where the court entered judgment for Northwest on the class-wide claim.¹⁷⁶

Relying on *Frank's Nursery*, the Sixth Circuit reversed the orders of both district courts, holding that the EEOC could pursue both monetary relief for Hamilton and injunctive relief for the class-wide claim.¹⁷⁷ Summarizing *Frank's Nursery*, the court reaffirmed that the FAA does not apply to the EEOC's independent right to sue under Title VII, and that the ability to seek monetary relief does not undermine the FAA.¹⁷⁸ Furthermore, preclusion does not apply because Hamilton had not previously litigated or arbitrated her claims.¹⁷⁹ The *Northwest Airlines* court did not find that an arbitration agreement would waive EEOC claims because the court determined that the EEOC has full authority to decide when it will file a Title VII suit.¹⁸⁰ Finally, the court held that the EEOC could seek class-wide

173. See *id.* at 699. See generally *supra* notes 49-55 and accompanying text (explaining purposes of injunctions, compensatory damages and punitive damages remedies under Title VII).

174. See *Northwest Airlines*, 188 F.3d at 699 (describing the transfer of the case to the District of Minnesota pursuant to 28 U.S.C. § 1404(a), "which allows for transfer in the district court's discretion to any other proper district when it furthers the convenience of parties and witnesses and is in the interest of justice.").

175. See *id.* (explaining that the district court treated Northwest's motion to dismiss as a motion for summary judgment). The Minnesota court had held that Hamilton must arbitrate her claim under her arbitration agreement with Northwest, and that the EEOC could not file suit on Hamilton's behalf. See *id.*

176. See *id.* (reporting how the Minnesota court transferred the remaining EEOC claim back to the Eastern District of Michigan, which ultimately granted summary judgment for Northwest Airlines due to the lack of evidence in support of the putative class claim).

177. See *id.* at 702-03 ("We leave for the district judge on remand to consider whether the EEOC can establish a claim for monetary damages for any employees other than Hamilton in light of *Frank's Nursery*"). The EEOC did not appeal the Minnesota District Court's dismissal of the consent decree claims. See *id.* at 701.

178. See *id.* at 701 ("We held in *Frank's Nursery* that [the FAA] does not apply to Title VII actions brought by the EEOC on behalf of an employee who has signed an arbitration agreement."); see also *supra* notes 142-48 and accompanying text (explaining *Frank's Nursery's* rationale regarding the FAA).

179. See *Northwest Airlines*, 188 F.3d at 701 (refusing to apply preclusion principles to prevent the EEOC's suit); see also *supra* notes 149-52 and accompanying text (explaining the *Frank's Nursery* court's rejection of preclusion principles).

180. See *Northwest Airlines*, 188 F.3d at 701 ("We need not fear that employees will sidestep arbitration agreements by having the EEOC bring suits . . . on their behalf because the decision whether to pursue a charge rests with the EEOC."); see also *supra*

injunctive relief based on Hamilton's claims alone.¹⁸¹

Significantly, *Northwest Airlines* involved allegations of egregious, intentional discrimination, where managers failed to respond to employees' complaints about Ku Klux Klan symbols and lynching nooses on display in the workplace.¹⁸² As Part IV.C of this Comment argues,¹⁸³ Congress added the damage remedies in the Civil Rights Act of 1991 to strengthen the EEOC's ability to eradicate and deter this type of intentional discrimination in the workplace.¹⁸⁴

Part III of this Comment illustrates the split among the circuit courts with respect to the effect of a mandatory arbitration clause on the ability of the EEOC to seek monetary relief in an independent suit.¹⁸⁵ The Sixth Circuit in *Frank's Nursery* and *Northwest Airlines* held that an arbitration agreement does not amount to a waiver, settlement, or prior litigation of claims.¹⁸⁶ Rather, the EEOC has independent authority to seek both monetary and injunctive remedies according to the language and legislative history of Title VII.¹⁸⁷ In contrast, the Second Circuit in *Kidder, Peabody*, and the Fourth Circuit in *Waffle House* contend that allowing the EEOC to seek monetary relief on behalf of an employee who signed an arbitration agreement undermines the FAA.¹⁸⁸ Part IV of this Comment will argue that the Sixth Circuit approach is consistent with *Gilmer* and the FAA, and best implements the purposes of Title VII and the Civil Rights Act of 1991.¹⁸⁹

notes 157-60 and accompanying text (discussing the *Frank's Nursery* court's rejection of waiver principles).

181. See *Northwest Airlines*, 188 F.3d at 702 (instructing the lower court, on remand, to consider class-wide injunctive relief based on Hamilton's claims); see also *supra* notes 163-65 (providing the *Frank's Nursery* court's rationale for allowing injunctive relief).

182. See *Northwest Airlines*, 188 F.3d at 697-98 (describing Hamilton's experiences with racial slurs, insults, and symbols as well as her managers' attitudes that she must deal with these incidents herself).

183. See *infra* notes 210-17 and accompanying text (elaborating on purposes of damage remedies in Civil Rights Act of 1991).

184. See generally 42 U.S.C. § 1981a(a)(1) (1994) (providing compensatory and punitive damages for cases of intentional discrimination in the workplace).

185. See *supra* Part II (illustrating the lack of consistency in the circuit courts as to the EEOC's right to claim monetary relief in instances of a mandatory arbitration clause).

186. See *supra* Part II.B (providing the Sixth Circuit's rationale for finding that an agreement to arbitrate does not eliminate claims brought by the EEOC).

187. See *supra* Part II.B (discussing the Sixth Circuit's decision to allow both monetary and injunctive remedies for the EEOC).

188. See *supra* Part II.A (providing the Second and Fourth Circuit's rationales concerning the proper scope of EEOC remedies).

189. See *infra* Part III.C (arguing that the courts should adopt the Sixth Circuit approach of allowing both monetary damages and injunctive relief).

III. ANALYSIS AND RECOMMENDATIONS

The Second, Fourth, and Sixth Circuit opinions illustrate two possible remedial options the EEOC may pursue when it sues on behalf of an employee who signed a mandatory arbitration agreement: (1) injunctive relief only, or (2) both monetary and injunctive relief.¹⁹⁰ The courts should adopt the Sixth Circuit approach and allow the EEOC to seek both monetary and injunctive relief under Title VII and other federal anti-discrimination statutes.¹⁹¹

A. Consensus Regarding Injunctive Relief

The consensus in the circuits permits the EEOC to seek an injunction to protect the public interest even in cases where an employee has previously litigated, settled, or waived a claim.¹⁹² Even the Second and Fourth Circuits, which held that a mandatory arbitration clause precludes the EEOC from seeking monetary relief under federal anti-discrimination statutes,¹⁹³ recognized that the EEOC protects the public interest through injunctions against future unlawful employment discrimination.¹⁹⁴ Without at least an injunctive remedy, the EEOC would be divested of all of Title VII's statutory remedies, both equitable and damages—an outcome contrary to the plain language of Title VII and its legislative history.¹⁹⁵ The ability to seek an injunction serves to prevent future violations of Title VII, benefiting both the injured employee and the class of workers at risk

190. See *supra* Part II (discussing holdings of Second, Fourth, and Sixth Circuits concerning the scope of EEOC remedies); see also *supra* note 63 (explaining that all of the circuits reject the district court's holding in *Frank's Nursery* that the EEOC is precluded from seeking either monetary or injunctive relief). Since all circuits have rejected the *Frank's Nursery* approach, this option does not merit further discussion.

191. See *infra* Part III.C (arguing courts should adopt the Sixth Circuit rationale).

192. See *supra* note 81 (collecting cases denying monetary relief when an employee has previously litigated, settled, or waived a claim, but allowing injunctive relief to protect the public interest).

193. See *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 813 (4th Cir. 1999), *cert. granted*, No. 99-1823, 2001 WL 285799 (Mar. 26, 2001) (holding that EEOC could not obtain monetary relief for employee who signed mandatory arbitration clause); *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 303 (2d Cir. 1998) (establishing that the EEOC could not seek monetary relief on behalf of employees who signed a mandatory arbitration clause).

194. See, e.g., *EEOC v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1253 (11th Cir. 1997) (“[T]here would be little point in [the EEOC] having the independent power to sue if it could not obtain relief beyond that fashioned for the individual claimant.”); see also *supra* text accompanying notes 85-88 (explaining the Second Circuit's rationale for allowing injunctive relief); *supra* note 114 (indicating that the Fourth Circuit adopted the Second Circuit rationale).

195. See *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 325 (1980) (indicating that Congress passed the 1972 amendments to Title VII because the “failure to grant the EEOC meaningful enforcement powers has proven to be a major flaw in the operation of Title VII”) (quoting S. REP. NO. 92-415, at 4 (1971)).

for future discrimination.¹⁹⁶ Furthermore, the EEOC's access to injunctive relief protects the public interest by subjecting employers to the court's contempt power if they refuse to comply with the injunction.¹⁹⁷

B. Only Injunctive Relief

Presently, the law in the Second and Fourth Circuits, based on the Supreme Court's decision in *Gilmer*,¹⁹⁸ is that a mandatory arbitration clause precludes the EEOC from seeking monetary relief on behalf of an employee, thereby making injunctive relief the EEOC's only available remedy.¹⁹⁹ This view purports to strike the proper balance between the public interest in eliminating employment discrimination and the enforcement of the private right to contract under the FAA.²⁰⁰ As critics have noted, however, the *Gilmer* opinion does not support the contention that an arbitration clause precludes the EEOC from seeking monetary relief.²⁰¹ In addition, preclusion

196. See *Massey Yardley*, 117 F.3d at 1253 (“[T]he EEOC represents the public interest when litigating claims, and, through injunctive relief, seeks to protect not only the rights of the individual claimant, but those of similarly-situated employees by deterring the employer from future discrimination.”) (citations omitted). See generally DOBBS, *supra* note 48, at 532-34 (explaining that the equitable remedy of injunction is used extensively in civil rights cases to provide temporary or permanent relief to individuals and groups); ROBERT N. LEAVELL ET AL., *EQUITABLE REMEDIES, RESTITUTION AND DAMAGES* 14-17 (5th ed. 1994) (explaining that one purpose of an injunction is to prevent future loss of an entitlement). The court will only issue a permanent injunction when the plaintiff can show a likelihood that the defendant will violate a right in the future, and that there is no adequate remedy at law because the injury is not adequately compensated in damages. See *id.* at 81. District courts typically fashion equitable remedies, such as the injunction, because they are more familiar with the underlying facts than a reviewing court and can better weigh the equities. See *id.* at 42.

197. See DOBBS, *supra* note 48, at 105 (explaining enforcement of the injunctive remedy through the contempt power of the court, in which an employer can be jailed, fined, or precluded from litigating an issue if it refuses to comply with a court order).

198. See *supra* Part I.A (analyzing the *Gilmer* decision and its enforcement of mandatory arbitration for federal statutory anti-discrimination claims under the FAA).

199. See *supra* notes 68-84 and accompanying text (discussing the Second Circuit's reliance on *Gilmer* and the FAA policy favoring enforcement of arbitration agreements); *supra* note 114 and accompanying text (discussing the Fourth Circuit's adoption of the Second Circuit's rationale).

200. See *supra* notes 113-15 (striking a balance between enforcing arbitration agreements and the EEOC's right to sue).

201. See *supra* notes 37-42 (describing the context of the *Gilmer* language stating that the EEOC can still seek injunctive relief on behalf of an employee who signed an arbitration agreement); see also *supra* note 86 (showing that the Second Circuit relied on the text of *Gilmer* to limit the EEOC to injunctive relief). But see Estreicher, *supra* note 8, at 1374 & nn.98-99 (disputing that *Gilmer* resolved the issue of whether the EEOC can seek only injunctive relief). For an analysis that supports mandatory arbitration, but critiques the *Kidder, Peabody* decision as unsound, see David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing*

principles do not apply in cases like *Frank's Nursery* where the employee's interests were not satisfied through prior litigation or arbitration.²⁰²

The relevant question regarding the "injunction only" option is whether the injunctive remedy is sufficient to serve the public interest. The United States Supreme Court has expressed doubt that the injunctive remedy alone is sufficient to deter employers from violating Title VII.²⁰³ In *Albemarle Paper*, the Court indicated that the primary objective of Title VII was to promote equal employment opportunities by removing barriers from the past and by preventing future discrimination.²⁰⁴ The *Albemarle Paper* Court recognized, however, that monetary remedies such as back pay were critical to

Out the Bath Water, and Constructing a New Sink in the Process, 2 U. PA. J. LAB. & EMP. L. 73, 116-18 (1999) (considering the *Kidder, Peabody* interpretation of the *Gilmer* decision).

First, Sherwyn argues that *Kidder, Peabody* is incorrect from a legal standpoint because the court takes *Gilmer's* statements regarding the EEOC's ability to seek injunctive relief out of context. See *id.* at 117 (arguing that the *Kidder, Peabody* interpretation of *Gilmer* is erroneous because it ignores *Gilmer's* statement that employees may still file claims with the EEOC, and holds without any basis that *Gilmer* allows the EEOC to bring a lawsuit only when seeking class-wide and equitable relief). Sherwyn states:

It is spurious to assume that a class-wide action seeking equitable relief represents the sole occasion upon which the EEOC may pursue a lawsuit on behalf of employees who have signed an arbitration agreement. Such an analysis goes beyond the Court's plain language and is inconsistent with the Court's statement that an employee may still file charges with the EEOC . . . The EEOC's only power is the threat of a lawsuit. If a lawsuit is not possible, there is no incentive for an employer to cooperate with the EEOC in its investigations and conciliation processes.

Id. at 117-18.

Second, Sherwyn argues that *Kidder, Peabody* is incorrect from a policy standpoint because allowing the EEOC to go to court and seek full statutory relief is necessary to maintain the relevance of the agency and to allow implementation of the agency's national enforcement plan. See *id.* at 118 (maintaining that a private arbitration agreement should not prevent the EEOC from using the courts and obtaining relief). The EEOC also argued in *Frank's Nursery* that *Gilmer* was misinterpreted and did not stand for the proposition that the EEOC could only seek class-wide injunctive relief. See EEOC *Frank's Nursery* Brief, *supra* note 159, at 22 (arguing that the district court misconstrued *Gilmer's* statement that "arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief" to mean that the EEOC could only pursue class claims and obtain injunctive relief where employees had signed an arbitration agreement).

202. See *supra* note 159 and accompanying text (explaining the Sixth Circuit's rejection of preclusion principles when the employee has not received a prior benefit in litigation or arbitration).

203. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (noting that the mere prospect of an injunctive order is not sufficient to make employers stop questionably legal practices, but a threat of a monetary award will cause employers to review their employment practices); see also *infra* note 215 (discussing the Supreme Court's view that an injunctive remedy alone is insufficient to deter discrimination, and that the prospect of monetary relief is necessary).

204. See *Albemarle Paper*, 422 U.S. at 417 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)) (discussing the primary objective of Title VII).

achieving this purpose by providing the necessary incentive to employers to change their discriminatory practices.²⁰⁵ Indeed, Judge Feinberg raised the very same concern in his concurring opinion in *Kidder, Peabody* when he disagreed with the majority's assumption that the deterrent value of an arbitration award is equal to the deterrent value of monetary relief in an EEOC action.²⁰⁶

Statistical data on monetary awards in civil actions compared to arbitration validate Feinberg's concerns. In a study evaluating the mean damages awarded in American Arbitration Association (AAA)²⁰⁷ arbitrations compared to federal district court cases, researchers found that the mean damages awarded in AAA arbitrations totaled \$49,030, compared to \$530,611 in federal civil actions.²⁰⁸ Based on such statistics, it is likely that the threat of a large award in an EEOC suit would have a stronger deterrent effect on employers than multiple, smaller arbitration awards.²⁰⁹

205. See *id.* at 417-18 (noting that the threat of a back pay award is necessary to cause employers to consider their actions). The *Albemarle Paper* Court recognized:

If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a back pay award that "provide(s) the spur or catalyst which causes employers . . . to self-evaluate their employment practices and to endeavor to eliminate . . . [discrimination]."

Id. (quoting *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)).

206. 152 F.3d 298, 304 (2d Cir. 1998) (Feinberg, J., concurring) (arguing that the risk and resulting deterrent value of a single large award in an EEOC case brought on behalf of multiple employees would be greater than that of multiple smaller awards obtained by employees through arbitration); *supra* note 90 and accompanying text (discussing Judge Feinberg's view that the threat of a large award in EEOC litigation has a greater deterrent effect than multiple smaller arbitration awards).

207. See Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights, in ARBITRATION NOW: OPPORTUNITIES FOR FAIRNESS, PROCESS RENEWAL AND INVIGORATION* 1, 4 (Paul H. Haagen ed., 1999) (finding that as of 1997, the AAA administered private arbitration plans covering over three million employees); see also Mackenzie & Zuchlewski, *supra* note 33, at 45 (stating that the American Arbitration Association (AAA) is a major private arbitration service provider).

208. See Maltby, *supra* note 207, at 17-18 (discussing mean damages awarded in AAA arbitration). Calculated as a percentage of damages demanded, the mean damages received from arbitration were 25% of the total amount demanded, while the mean damages received from litigation were 70% of the amount demanded. See *id.* at 18.

209. See *supra* notes 55-55 (exploring the deterrent effect of monetary damages). The same AAA study, however, also demonstrates the benefits of arbitration to employee-plaintiffs. See Maltby, *supra* note 207, at 18. Plaintiffs win more often in AAA arbitrations (63%) than in litigation (14.9%), and as a percentage of demand awarded to all plaintiffs (not just successful plaintiffs), arbitration awards (18%) actually exceed litigation awards (10.4%). See *id.*; see also Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1055 (1998) (citing a government commission's report indicating that litigation entails high costs and long delays that may be burdensome on low wage workers); John W. R. Murray, Note, *The Uncertain Legacy of Gilmer: Mandatory Arbitration of Federal Employment Discrimination Claims*, 26 FORDHAM URB. L.J. 281, 295-

In addition to the insufficient deterrent effect of the injunction only option, as recently as 1991, Congress affirmatively recognized that additional remedies were needed to eliminate and prevent employment discrimination.²¹⁰ Congress added compensatory and punitive damage remedies to the traditional equitable remedies available under Title VII²¹¹ and the Americans with Disabilities Act (ADA)²¹² in the Civil Rights Act of 1991.²¹³ The plain language of the 1991 Act states, "Congress finds that . . . additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace."²¹⁴ In addition, the legislative history of the 1991 Act shows that Congress was aware of the *Albemarle Paper Co. v. Moody*²¹⁵ case when it approved damage remedies to enhance the deterrent effect of Title VII remedies.²¹⁶ Particularly, the prospect

97 (1999) (explaining that arbitration saves time and money for the average employee compared to the time and expense of filing a charge with the EEOC and following the case through district courts crowded with discrimination claims).

210. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 1981a (1994)) (providing additional remedies under federal law to deter discrimination in the workplace).

211. See 42 U.S.C. § 2000e to 2000e-17 (1994) (as amended); see also *supra* notes 48-51 (describing traditional equitable remedies available under Title VII prior to 1991 Act).

212. See 42 U.S.C. § 12117(a) (1994) (setting forth remedies available to a person who proves discrimination on the basis of disability).

213. See 42 U.S.C. § 1981a(a)(1) (providing the complaining party with the right to recover compensatory and punitive damages). Although plaintiffs suing under the Age Discrimination in Employment Act (ADEA) cannot seek compensatory and punitive damages under the 1991 Act, they can still seek liquidated damages, an amount equal to lost compensation, in addition to back pay in cases of willful discrimination. See 29 U.S.C. § 626(b); see also LEWIS, *supra* note 50, at 317-19 (comparing Title VII and ADEA remedies, and concluding that the ADEA plaintiff may still be able to recover more than the Title VII plaintiff in cases against smaller employers, without the caps on damages found in the 1991 Act).

214. See Civil Rights Act of 1991, § 2, 42 U.S.C. § 1981a (1994) (Congressional Findings).

215. 422 U.S. 405, 417-18 (1975) (articulating the Supreme Court's position that the prospect of monetary relief is necessary to deter employers from engaging in employment discrimination); see also *supra* note 205 (describing the *Albemarle Paper* Court's view that an injunction alone is insufficient to deter employers from the unlawful discrimination of employees).

216. See H.R. REP. NO. 102-40(I), at 69 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 607. Articulating the purposes of the 1991 Act, the House Committee on Education and Labor found "a compelling need to permit the recovery of damages under Title VII" to serve three purposes: enhancing Title VII's effectiveness by making victims of intentional discrimination whole, deterring future discrimination, and encouraging enforcement of the statute by private parties. See *id.* at 64-70. Additionally, the House Committee on Education and Labor cited *Albemarle Paper* in support for their conclusion that damage remedies are needed because often back pay is often insufficient to compensate victims for injuries. See *id.* at 69 (also noting that back pay has not served as an effective deterrent). The committee stated:

Back pay as the exclusive monetary remedy under Title VII has not served as an effective deterrent, and when back pay is not available, as is the case where a discrimination victim remains on-the-job or leaves the workplace for

of punitive damages, awarded by the jury in a civil case, would create a strong deterrent effect among employers.²¹⁷

The Civil Rights Act of 1991 also contains section 118, a provision that encourages the use of alternative dispute resolution, including arbitration, to resolve disputes under the federal laws amended by the Act.²¹⁸ Some scholars have interpreted section 118 broadly to mean that Congress did not intend for federal statutory discrimination claims to be subject to mandatory arbitration at all.²¹⁹

other reasons other than discrimination, there is simply no deterrent. *Id.* For additional discussion of the 1991 Act's damage provisions' impact on EEOC enforcement powers, see generally Livingston, *supra* note 7, at 53-72 (reviewing the punitive damage provisions of the 1991 Act and evaluating their impact on EEOC enforcement powers).

217. *See supra* notes 55-57. Based on the high level of proof required to obtain punitive damages and the caps on damages in the statute, the House Committee rejected as having no merit any contention that jury awards under the 1991 Act would be disproportional to the harm caused. *See* H.R. REP. NO. 102-40(I), at 72-73 (noting that sufficient procedural impediments exist to ensure that large awards will be granted only in the most deserving of cases). The Committee stated:

Just as they have for hundreds of years, juries are fully capable of determining whether an award of damages is appropriate and if so, how large it must be to compensate the plaintiff adequately and to deter future repetition of the prohibited conduct. In any case, the procedural and substantive limitations set forth above serve to check jury discretion in awarding such damages. Judges serve as an additional check: they can and do reduce awards which are disproportionate to the defendant's discriminatory conduct or the plaintiff's resulting loss Of course, substantial awards may be both necessary and appropriate in some cases in order to compensate the victim fully for his or her injuries, or to ensure that the employer is deterred from engaging in future acts of discrimination.

Id.

218. *See* Civil Rights Act of 1991, § 118, 42 U.S.C. § 1981a (1994) (Alternative Means of Dispute Resolution) ("Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.").

219. *See* Murray, *supra* note 209, at 302-04 (arguing that § 118 provides a strong argument that statutory claims under Title VII, the ADA, and the ADEA are not subject to compulsory arbitration). Murray cites the following passage from the House Committee reports:

[T]he use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Garner-Denver Co.*

H.R. REP. NO. 102-40(I), at 97; *see also* Mark L. Adams, *Compulsory Arbitration of Discrimination Claims and the Civil Rights Act of 1991: Encouraged or Proscribed?*, 44 WAYNE L. REV. 1619, 1637-56 (1999) (conducting a thorough analysis of the impact of the legislative history of the Civil Rights Act of 1991 and concluding that Congress did not intend for section 118 to require compulsory arbitration of Title VII claims). *But see* George Nicolau, *Gilmer v. Interstate/Johnson Lane Corp.: Its Ramifications*

At the very least, however, section 118 demonstrates that Congress viewed the provisions strengthening the EEOC's enforcement powers through compensatory and punitive damages as consistent with alternative dispute resolution, including arbitration.²²⁰ It would undermine congressional efforts to bolster the EEOC's enforcement powers if employers could avoid the new damage remedies simply by placing mandatory arbitration clauses in employment contracts or application forms.²²¹ In addition, it is also significant that the Second and Fourth Circuits did not consider evidence of congressional intent under section 118 to increase the remedies available to combat employment discrimination.²²²

C. Both Monetary and Injunctive Relief

Concerns about meaningful implementation of the Civil Rights Act of 1991 and the inadequate deterrent effect of injunctive relief alone both demonstrate that the EEOC needs monetary relief to adequately address the make-whole and deterrent purposes of Title VII.²²³ Therefore, the Sixth Circuit's decision to allow the EEOC to seek both monetary and injunctive relief is necessary to guarantee the EEOC's effective enforcement of Title VII and other federal anti-discrimination statutes.²²⁴ The courts should adopt the Sixth Circuit's approach because it best implements the congressional intent of Title VII and the 1991 Act, and it is consistent with *Gilmer* and the FAA. This approach also best fulfills the purposes of the damage

and Implications for Employees, Employers and Practitioners, 1 U. PA. J. LAB. & EMP. L. 177, 189 (1998) (indicating that it is unclear under the Civil Rights Act of 1991 whether the arbitration provisions support mandatory arbitration, or only voluntary arbitration).

220. See *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1304 (9th Cir. 1994) (stating that the House Report on section 118 of the Civil Rights Act of 1991 "explained that the purpose of that section was to increase the possible remedies available to civil rights plaintiffs"); see also Adams, *supra* note 219, at 1637-40 (arguing the legislative history of the 1991 Act shows that Congress intended the provision on alternative dispute resolution techniques to increase, not decrease, remedies available under Title VII).

221. Given the widespread and increasing use of arbitration agreements, such a result would seriously undermine the EEOC's enforcement powers because employers will have established a "private justice system." See Maltby, *supra* note 207, at 4 (indicating that in 1979 only 1% of employers used private arbitration, increasing in 1995 to 10%, and rising to 19% in 1997, the latter figures representing an increase of nearly 90% in two years).

222. See Karen Halverson, *Arbitration and the Civil Rights Act of 1991*, 67 U. CIN. L. REV. 445, 446 (1999) (stating that section 118 of the 1991 Act endorses the use of arbitration under various anti-discrimination statutes, including Title VII, the ADA, and the ADEA); see also *supra* Part II.A (explaining the Second and Fourth Circuit rationales for limiting the EEOC to injunctive relief).

223. See *supra* Part III.B (showing the inadequacy of injunctive relief alone).

224. See *supra* Part II.B (discussing the Sixth Circuit's rationale for allowing both monetary and injunctive relief).

remedies—to compensate victims and to deter future discrimination.

The language of Title VII supports the Sixth Circuit interpretation that the EEOC has exclusive jurisdiction to determine whether to file an employment discrimination suit and, if so, sever the employee's right to file an individual claim.²²⁵ The aggrieved employee, however, maintains the right to intervene in the EEOC action.²²⁶ The EEOC should be able to sue for monetary and injunctive relief on behalf of an employee who has signed an arbitration agreement, but does not pursue arbitration. The EEOC's ability to sue under such circumstances would be similar to the agency's ability to sue for monetary and injunctive relief on behalf of an employee who has a right to sue in court, but does not initiate a private suit or intervene in an EEOC proceeding.²²⁷

As a practical matter, the Sixth Circuit's decision ensures meaningful enforcement of federal civil rights laws. This precedent would not allow employees to make an "end run" around the arbitration agreement.²²⁸ In his concurring opinion in *Kidder, Peabody*, Judge Feinberg argued that the EEOC has limited resources and would pursue monetary relief only when appropriate.²²⁹ Statistics from 1993 indicate that the EEOC only filed an independent suit in 418 out of 87,942 complaints filed, less than 1 percent of charges.²³⁰ Furthermore, government reports estimate that the EEOC has a backlog ranging from 74,541²³¹ to 111,000 cases.²³² As these practical considerations demonstrate, the EEOC receives thousands of complaints, has limited resources, and only files suit in a small

225. See *supra* Part I.B (providing an overview of the Title VII statutory scheme); see also *supra* notes 133-37 (explaining the Sixth Circuit's application of the Title VII statutory scheme in *Frank's Nursery*).

226. See 42 U.S.C. § 2000e-5(f)(1) (1994); see also *supra* note 44-46 (articulating the amended Title VII statutory scheme).

227. As aptly stated by the *Frank's Nursery* court, "Adams therefore stands in the same shoes as an individual who possesses the 'right to sue' but never files a complaint." 177 F.3d 448, 464 (6th Cir. 1999).

228. See *EEOC v. Kidder, Peabody & Co., Inc.*, 156 F.3d 298, 304 (2d Cir. 1998) (Feinberg, J., concurring) (challenging the majority's contention that allowing monetary relief would amount to an "end run" around the arbitration clause since, given the EEOC's limited resources, it would likely not pursue an employee claim just to allow the employee to avoid arbitration).

229. See *id.* (Feinberg, J., concurring) ("I do not think it likely that the EEOC will pursue monetary damages simply to accommodate employees seeking to avoid arbitration . . .").

230. See Maltby, *supra* note 207, at 29 & n.164 (noting that most employees wronged by their employers will never seek justice).

231. See *id.* at 28 & n.157 (quoting EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SUMMARY OF ENFORCEMENT DATA AND BUDGET AND STAFFING INFORMATION, FY 1991-1996).

232. See Halverson, *supra* note 222, at 460 & n.93 (citing EEOC backlog figures from 1995 to show that the EEOC operates under severe budget constraints).

number of cases.²³³ Under these circumstances, it is unreasonable to assume that the thousands of employees who entered into arbitration agreements reasonably can expect the EEOC to litigate their claims in order to avoid arbitration under the FAA.²³⁴

The power to seek damage remedies also allows the EEOC to combat egregious or repeated acts of discrimination by employers that may not be deterred by smaller arbitration awards.²³⁵ *Northwest Airlines* illustrates the situation in which the EEOC may need to seek the full range of legal damages authorized by the Civil Rights Act of 1991 for two reasons.²³⁶ First, the EEOC's 1991 Act Enforcement Guidelines²³⁷ weigh several factors to determine whether an employer's conduct shows the "malice or reckless indifference"²³⁸ required to seek punitive damages for intentional discrimination, including: the degree of egregiousness and nature of the employer's conduct,²³⁹ the severity of the harm, duration of harm, presence of past discriminatory conduct by the employer, and the employer's remedial actions after being informed of the discrimination.²⁴⁰

233. See Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 425 (1999) (explaining that the EEOC is only able to take a "small fraction" of its cases to court because of rising backlogs and budget reductions and has adopted a priority system to help it manage cases); see also Halverson, *supra* note 222, at 460 & n.93 (noting that the EEOC has continued operations despite severe budgetary constraints, which, adjusted for inflation, actually show a decreasing budget for the agency since 1990). One reason for the budgetary limitations is that Congress has charged the EEOC with enforcement of three additional statutes since 1990, including the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994), the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at scattered sections of 42 U.S.C.), and the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (1994). See Halverson, *supra* note 222, at 460 & n.92 (noting the EEOC operates under budget constraints since enforcement duties have increased while the commission budget has decreased in inflation adjusted terms).

234. See *EEOC v. Kidder, Peabody & Co., Inc.*, 156 F.3d 298, 304 (2d Cir. 1998) (Feinberg, J., concurring) (concluding that given the EEOC's limited resources and the resulting fact that EEOC can pursue only limited claims, allowing the EEOC to seek monetary remedies would not actually undermine the FAA).

235. See *supra* note 90 and accompanying text (stating Judge Feinberg's contention in his concurring opinion in *Kidder, Peabody* that the threat of a large award in an EEOC suit would have a far greater deterrent effect than multiple smaller arbitration awards); see also *supra* notes 207-09 and accompanying text (providing statistical evidence supporting Feinberg's position).

236. See *supra* Part III.B.2 (discussing the Sixth Circuit's rationale in *Northwest Airlines* for allowing the EEOC to seek both monetary and injunctive relief under Title VII on behalf of an employee who signed a mandatory arbitration agreement).

237. See EEOC DAMAGES GUIDANCE, *supra* note 54 (setting forth the EEOC's guidelines on the availability of compensatory and punitive damages).

238. See *supra* note 55 (explaining the "malice or reckless indifference" standard for punitive damages).

239. The EEOC defines egregious conduct as conduct that shocks or offends the conscience. See EEOC DAMAGES GUIDANCE, *supra* note 54, at 16.

240. See *id.* at 16-18 (listing other factors including evidence of a cover-up and

All of these factors arguably were met in the *Northwest Airlines* case, in which shocking, race-based statements and symbols were used in the workplace over an extended period of time, with insufficient remedial response from the employer and evidence that Northwest Airlines had problems with racial harassment in the past based on a consent decree issued in a previous case.²⁴¹ To meet the statutory goals of the 1991 Act, the EEOC should be able to seek monetary damages in such cases.²⁴²

Second, the policy goals of the punitive damages remedy warrant public, judicial resolution of this type of case, not only to deter Northwest Airlines, but more importantly, to deter other employers who would learn by example.²⁴³ Under EEOC enforcement guidelines, the court also may consider the employer's size and financial position, so that the magnitude of the punitive award will sufficiently deter the employer charged and other similar employers.²⁴⁴ As the EEOC argued in the *Northwest Airlines* case, mandatory arbitration clauses should not undermine the statutory and policy justifications for allowing the EEOC to seek punitive damages under Title VII.²⁴⁵

proof of retaliation.). See generally Rhonda M. Taylor, *In Search of the Appropriate Standard for Awarding Punitive Damages Under 42 U.S.C. § 1981A*—Kolstad v. American Dental Ass'n, 30 U. MEM. L. REV. 763, 770-74 (2000) (explaining the standards for awarding punitive damages in Title VII cases).

241. See Brief of the Equal Employment Opportunity Commission as Appellant at 4-12, *EEOC v. Northwest Airlines, Inc.*, 188 F.3d 695 (6th Cir. 1999) (No. 98-1667) [hereinafter *Northwest Airlines Brief*] (providing detailed evidence of alleged repeated racial harassment problems at Northwest Airlines) (on file with *American University Law Review*).

242. See *supra* text accompanying note 184 (advancing the Sixth Circuit's argument that the 1991 Act envisioned monetary damages as a form of relief for aggrieved employees).

243. See Moohr, *supra* note 233, at 430-32 (explaining that awarding punitive damages serves the dual purpose of deterring the current violator, and more importantly, potential violators). Stressing the importance of the general deterrent effect of a punitive damages award, Moohr cautioned that: "[p]otential violators can appreciate the threat of sanctions only when they learn that similarly situated actors have been punished The public forum of litigation makes this information available to the parties, to entities similar to the parties, and to the general public." *Id.* at 431. Therefore, public litigation furthers the policy goal of general deterrence and education of potential violators but arbitration, conducted in private, does not. See *id.* at 431-32.

244. See *id.* at 431 (explaining that public knowledge of the size of the punitive damages award enables other potential violators to "calculate the costs and benefits of engaging in the prohibited conduct") (citations omitted).

245. See *Northwest Airlines Brief*, *supra* note 244, at 27 (discussing the destructive impact that allowing a mandatory arbitration clause to override the EEOC enforcement powers would have on the statutory and policy justifications behind the damages provided for under title VII). Referring to Congress' intent under the 1991 Act to strengthen the EEOC's ability to deter employment discrimination through money damages, the EEOC appealed the decision of the district court denying monetary (and equitable) relief, stating:

Another benefit of the Sixth Circuit approach is that it provides a safeguard against arbitration agreements that do not provide the full range of statutory remedies.²⁴⁶ The *Gilmer* Court stated that “[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action, in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”²⁴⁷ Allowing the substantive rights of Title VII to be enforced in private arbitration, however, raises concerns about the remedies available during arbitration.²⁴⁸ Unless the arbitration agreement allows the arbitrator to award the full remedies under the statute, the results of arbitration may not adequately address the remedial and deterrent functions of Title VII.²⁴⁹ The Sixth Circuit approach allows the EEOC to seek both monetary and injunctive relief to ensure vindication of statutory rights when arbitration agreements do not incorporate full

If the district court’s ruling were upheld, it would effectively disarm the Commission as an enforcement agency. By the simple expedient of adopting an arbitration policy, employers could guarantee that the Commission . . . could not recover any monetary or equitable relief in an enforcement action—even though such relief is expressly provided in Title VII and the 1991 Civil Rights Act—regardless of how egregiously the statute were violated.

Id.

246. See *EEOC v. Kidder, Peabody & Co., Inc.*, 156 F.3d 298, 304 (2d Cir. 1998) (Feinberg, J., concurring) (expressing doubt about the majority’s assumption that federal statutory rights can be equally vindicated in the arbitral forum); see also LEAVELL ET AL., *supra* note 196, at 1131-33 (explaining that the remedies the arbitrator may award are determined by the terms of the parties’ agreement, and that the availability of punitive damages is a highly contested issue); Mackenzie & Zuchlewski, *supra* note 33, at 39-42 (observing that in the post-*Gilmer* era, courts have shifted their focus to whether the arbitral forum provides for due process, or a fair and full vindication of federal statutory rights).

247. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)) (alterations in original).

248. See, e.g., *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999) (refusing to enforce a one-sided arbitration agreement in which the employer selected the arbitrators, completely controlled the arbitration proceedings, and did not allow for full statutory remedies under Title VII); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 201 (2d Cir. 1998) (declaring arbitration agreements that do not provide procedures allowing a full vindication of statutory rights to be unenforceable).

249. See *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) (identifying availability of full statutory remedies as an essential element of due process in the arbitration context); see *id.* at 1480 (quoting AMERICAN ARBITRATION ASSOCIATION, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES 32(c) (1996)) (“The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable, including, but not limited to, any remedy or relief that would have been available to the parties had the matter been heard in court.”); Estreicher, *supra* note 8, at 1349-50 (citing the Departments of Commerce and Labor Commission on the Future of Worker-Management Relations (“Dunlop Commission”) report, which identifies “a range of remedies equal to those available through litigation” as an essential safeguard in the arbitral forum).

statutory remedies.²⁵⁰

Judicial concern over the remedies available in the arbitral forum counters the Second and Fourth Circuit's contention that an arbitration agreement functions like a waiver agreement.²⁵¹ Under the waiver analogy, if an employee can waive his or her right to file a claim in court or to receive benefits from an EEOC law suit, then the arbitration agreement also functions as a waiver of the right to receive individual benefits in federal court personally or through an EEOC suit.²⁵² This logic conflicts with the *Gilmer* Court's determination that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."²⁵³ Unless the arbitral forum provides for full statutory remedies, including compensatory and punitive damages as well as injunctive relief, it is unclear how *Gilmer's* requirement of full vindication of statutory rights in the arbitral forum will be met.

Finally, under the Sixth Circuit approach, the district courts also retain judicial discretion to award back pay, an equitable monetary remedy, in the interests of fairness.²⁵⁴ In *Lemon v. Kurtzman*,²⁵⁵ the Supreme Court stated that "in equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in competing interests"²⁵⁶ An arbitration clause should not divest the courts of the authority granted in the initial Title VII statute to award equitable monetary relief in the form of back pay to employees who did not file an arbitration suit because

250. See Adams, *supra* note 219, at 1675. Adams explains that even if the arbitration procedure allows compensatory and punitive damages, the arbitrator may be reluctant to award them because the employer would be less likely to select the arbitrator in subsequent arbitrations. See *id.* Therefore, litigation should still be an option for the EEOC to protect procedural and substantive rights when the arbitration process does not provide sufficient protection of those rights. See *id.*

251. See *supra* notes 68-80 and accompanying text (discussing the Second Circuit's view that an arbitration agreement functions like a waiver or settlement); see also *supra* note 114 (indicating that the Fourth Circuit adopted the Second Circuit's rationale).

252. See *supra* notes 68-81 and accompanying text (describing how the Second Circuit's view of arbitration agreements limits employee's substantive statutory rights); see also *supra* notes 91-113 (detailing the Fourth Circuit's concurrence with the Second Circuit's view of arbitration agreements).

253. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

254. See *supra* note 50 (explaining that back pay, an equitable remedy in the original Title VII statute, is awarded by the court in interest of fairness).

255. 411 U.S. 192, 201 (1973).

256. *Id.* Similarly, in *Albemarle Paper Co. v. Moody*, the Court stated, "[i]t is true that '[e]quity eschews mechanical rules . . . [and] depends on flexibility.'" 422 U.S. 405, 417 (1975) (citations omitted).

they were intimidated, uninformed, or lacked the resources to do so.

CONCLUSION

The courts should adopt the Sixth Circuit's approach and permit the EEOC to seek monetary and injunctive relief. This approach best implements the congressional intent underlying Title VII and the Civil Rights Act of 1991, and is fully consistent with the *Gilmer* decision and the FAA.²⁵⁷ The Sixth Circuit's decision promotes the dual purposes of the damage remedies—to compensate victims and to deter future discrimination.²⁵⁸ As Congress intended, the EEOC should be able to seek compensatory and punitive damages to ensure specific compliance by an employer who violated Title VII and to prevent similar violations by other employers in the future.²⁵⁹ The Sixth Circuit's approach also provides a safeguard against arbitration agreements that do not provide the full range of statutory remedies.²⁶⁰ Most importantly, the Sixth Circuit's opinion, which enables the EEOC to seek both monetary and injunctive relief on behalf of employees bound to arbitration agreements, preserves the EEOC's authority to eradicate and deter employment discrimination.²⁶¹

257. *See supra* Parts III.B and III.C (explaining the benefits of the Sixth Circuit rationale).

258. *See supra* notes 243-45 and accompanying text (supporting the deterrent effect of the Sixth Circuit approach).

259. *See supra* notes 243-45 and accompanying text (discussing the compensatory and deterrent intent of congress' grant to the EEOC of such remedies).

260. *See supra* notes 246-50 (outlining judicial concerns about the lack of full statutory remedies available in the arbitral forum).

261. *See supra* Part I.B (explaining Congress' intent to strengthen the powers of the EEOC with the 1972 amendments to the Title VII statutory scheme).